92-571

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,

Petitioner,

v.

BANKATLANTIC,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. May an appellate court, upon review of a district court order which summarily disposed of claims prior to trial, uphold the judgment based on evidence which was not part of the record before the district court at the time the order was rendered.

2. Whether contractual alternative dispute remedies are inapplicable to tort claims predicted on contractual breach.

PARTIES TO THE PROCEEDING

Petitioner is PaineWebber Incorporated.

Respondent is BankAtlantic, a federal savings bank.

DESIGNATION OF CORPORATE RELATIONSHIPS

A list of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of Petitioner PaineWebber Incorporated, and of each such corporation, is included in the Appendix which accompanies this Petition at A-132.[1]

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[1] References to PaineWebber Incorporated's Appendix to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed contemporaneously herewith, are cited herein as "A- ."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner, PaineWebber Incorporated (hereinafter "PaineWebber"),[2] requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

[2] The named defendant, Blythe Eastman Paine Webber, Inc. is now PaineWebber Incorporated.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 955 F.2d 1467 (11th Cir. 1992) and is set out in the Appendix to this petition at A-3. The orders of the district court granting BankAtlantic, a federal savings bank (hereinafter "BankAtlantic"),[3] judgment on the pleadings dismissing PaineWebber's counterclaim, and denying PaineWebber's motion for reconsideration, entered on October 10, 1989 and January 19, 1990 respectively, are included in the Appendix at A-50 and A-35.

JURISDICTION

The opinion of the Court of Appeals for which certiorari is sought was entered on March 23, 1992. 955 F.2d 1467 (11th Cir. 1992). A-3. On July 2, 1992, the Court of Appeals denied the petition for rehearing filed by BankAtlantic. A-1.

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1). The petition is timely under 28 U.S.C. §2101(c) and Rules 13.1 and 13.4 of this Court.

STATUTES INVOLVED

Federal Rule of Civil Procedure 12(c) provides:

> (c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be

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[3] BankAtlantic was known as Atlantic Federal Savings & Loan Association at the time this litigation was commenced.

treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

PaineWebber is a financial services company incorporated and located in New York. BankAtlantic is a federal savings and loan association located in Fort Lauderdale, Florida. At the time of this litigation, BankAtlantic was one of the largest savings and loan institutions in Florida and in the United States.

In 1984, BankAtlantic retained PaineWebber as a financial advisor and to assist it in blocking several hostile takeover attempts. The parties entered a financial advisor agreement which was negotiated between them with each represented by its counsel. A-9-10; A-72-82.

Based on PaineWebber's recommendation, BankAtlantic entered into two interest rate swaps[4] with Homestead Savings & Loan Association of California in an effort to hedge its adjustable rate deposit payables against an increase in interest rates. PaineWebber served as broker in the two interest rate swaps. A-9-10.

Alleging non-performance under the agreement, BankAtlantic terminated the services of PaineWebber as financial advisor and employed another firm to assist with the interest rate swaps. During this time, interest rates were falling drastically. A-10.

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[4] An interest rate swap is an agreement by which one party agrees to pay the counterparty a fixed rate of interest on a notional amount for a specified period of time. In return, the counterparty agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

After PaineWebber was terminated, the corporate raider PaineWebber was hired to keep out gained control of BankAtlantic. In August 1987, BankAtlantic, now under its new management, brought suit against PaineWebber alleging that losses of $30 million were caused by PaineWebber's alleged failure to disclose the risks involved in interest rate swaps, e.g., that if interest rates fell, the high yielding fixed rate mortgages would be prepaid as borrowers refinanced. A-10. The complaint alleged breach of contract,[5] breach of fiduciary duty, fraud, fraudulent concealment, negligence, and negligent misrepresentation. Id.; A-93-100. All claims were based upon or arose out of the financial advisor agreement which was attached as an exhibit to the complaint and was incorporated into each claim. A-105. The district court had jurisdiction pursuant to 28 U.S.C. §1332.

PaineWebber served its answer denying liability and filed a counterclaim for recovery of fees and costs as provided by the indemnification provisions of the financial advisor agreement. A-10, 66. The counterclaim alleged that BankAtlantic's lawsuit triggered the agreement's indemnity provisions and shifted the economic risks of any such action from PaineWebber to BankAtlantic. A-70. The indemnity provides that BankAtlantic will "reimburse [PaineWebber] for any reasonable expenses incurred (including reasonable fees and disbursements of counsel) in connection with the . . . defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with [PaineWebber's] acting pursuant to the [agreement]. . . ." A-79-80.

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[5] BankAtlantic abandoned its breach of contract claim during trial and the district court later dismissed that claim with prejudice.

BankAtlantic filed a motion for judgment on the pleadings with respect to PaineWebber's counterclaim which was granted by the district court. A-10, 52. The district court dismissed the counterclaim ruling that while the indemnity shifted liability, it only did so as to third party claims. A-52. Such intention was contradicted by the pleadings, especially PaineWebber's counterclaim. A-66.

On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber on all claims. A-10, 40. Neither the district court nor the jury ever made a finding that the interest rate swaps were outside the scope of the financial advisor agreement. At all times, plaintiff argued successfully that the swaps were encompassed by the agreement. *See* A-46.

In February 1990, BankAtlantic appealed from the final judgment in favor of PaineWebber. PaineWebber appealed from the dismissal of its counterclaim. The appeals were consolidated. The Eleventh Circuit had jurisdiction pursuant to 28 U.S.C. §1291. On March 23, 1992, the Eleventh Circuit rendered its opinion and judgment reported at 955 F.2d 1467. A-3.

In its main brief on appeal, BankAtlantic continued to argue the legal theory that all of its claims against PaineWebber arose out of and were dependent on the financial advisor agreement. PaineWebber, in its answer brief, maintained that BankAtlantic's entire appeal was moot because any claim BankAtlantic pursued at trial and on appeal was barred under Florida's economic loss rule or independent tort doctrine. In the absence of personal injury or property damage, Florida bars tort claims solely for economic losses. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987); *Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987). Florida's rule is premised on

this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). *Id.* The Eleventh Circuit applied the *AFM* doctrine in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769 (11th Cir. 1991).

In its reply brief, BankAtlantic changed its position and for the first time argued that the two interest rate swaps were not encompassed in the financial advisor agreement. The Eleventh Circuit held that *Interstate Securities* did not bar BankAtlantic's tort claims, because the interest rate swaps were outside the scope of the contract, and consequently, its indemnity provisions. A-26.

The Eleventh Circuit considered and relied upon factual issues and evidence presented during trial in order to affirm the dismissal rendered prior to trial. The appellate court held that PaineWebber's arguments regarding the evidence at trial made in response to BankAtlantic's j.n.o.v. motion justified the pretrial dismissal. A-26, 28-29.

The appellate court did not comment on the allegations of the pleadings which were directly contrary to the position the court adopted to affirm the dismissal. The opinion conflicts with the other circuits and this Court both in the construction and application of Rule 12(c), and the jurisdictional limitations on an appellate court's ability to consider an argument first made on appeal. The majority of circuits prohibit appellate review of materials not of record at the time of a pretrial adjudication.

The Eleventh Circuit's opinion is squarely at odds with Florida law set out in *AFM Corp. v. Southern Bell Telephone & Telegraph Co.*, 515 So. 2d 180, which was based on this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, and applied in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769.

REASONS FOR ALLOWING THE WRIT

I. THE ELEVENTH CIRCUIT'S HOLDING THAT IT COULD AFFIRM A SUMMARY DISMISSAL BASED ON FACTS AND THEORIES WHICH WERE NEITHER PART OF THE PLEADINGS NOR BEFORE THE DISTRICT COURT AT THE TIME THE DISMISSAL WAS RENDERED IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS, AND IS INCONSISTENT WITH SUPREME COURT PRECEDENT.

The Eleventh Circuit's holding that it could affirm a pretrial dismissal based upon material which was not of record at the time of the trial court's order, conflicts with the majority of circuits, and is contrary to opinions of this Court. The majority of circuits hold that appellate review of pretrial dismissals is limited to the material of record at the time of the district court's ruling. *See Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 (5th Cir. 1991) (court of appeals may not consider evidence or arguments not presented to district court for district court's consideration in ruling on the motion), *petition for cert. filed*, 61 U.S.L.W. 3005 (June 24, 1992); *Catrett v. Johns-Manville Sales Corp.*, 826 F.2d 33, 37 (D.C. Cir. 1987) ("Our sole and limited task is to assess with care the record before the District Court at the time it granted Celotex's summary judgment motion and to determine whether that ruling was proper in light of the state of the record at that juncture"), *cert. denied*, 484 U.S. 1066 (1988); *Glaros v. H. H. Robertson Co.*, 797 F.2d 1564, 1568-69 (Fed. Cir. 1986) ("To succeed on appeal, [appellant] must show that he did submit such evidence *before* summary judgment was granted"), *cert. dismissed*, 479 U.S. 1072 (1987); *Voutour v. Vitale*, 761 F.2d 812, 817 (1st Cir. 1985) ("Our review is confined to an examination of the

materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant."), *cert. denied*, 474 U.S. 1100 (1986); *Dictograph Prods. Co. v. Sonotone Corp.*, 231 F.2d 867, 867-68 (2d Cir.) (appellate court has no "jurisdiction" to consider depositions or other evidence not filed in the district court when the motion was decided), *cert. dismissed*, 352 U.S. 883 (1956); *Harkins Amusement Enters., Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988) ("the relevant record on review of summary judgments is the record as it existed at the time the motion was considered); *see Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970) (statement "not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

The Eleventh and Third Circuits hold to the contrary and permit consideration of evidence not before the district court at the time of its disposition. *See Sammons v. Taylor*, 967 F.2d 1533, 1544 (11th Cir. 1992) (appellate court is not jurisdictionally barred from considering evidence and arguments not presented to district court); *Ford Motor Co. v. Summit Motor Prods., Inc.*, 930 F.2d 277, 285 (3d Cir.) (appellate court will "consider any additional evidence in the record before [it], even though that evidence may have been submitted to the district court after it had ruled on [counterdefendant's] motion . . . ."), *cert. denied*, 112 S. Ct. 373 (1991).

This Court also should grant certiorari because of the compelling importance of the issue presented.[6] The decisions of this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), have increased the number of pretrial dispositions on their merits. An instructive opinion to the circuit courts of appeals as to the jurisdictional limitations on review of such dispositions is essential.

The dismissal on the pleadings was entered prior to trial, and as such the only material that the district court legally could review was the pleadings, consisting of the complaint, answer, counterclaim, and answer to the counterclaim. The appellate court in its *de novo* review did not restrict itself to the pleadings. Instead, the court based its ruling on post-trial arguments and evidence presented during trial such as PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v.

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[6] The issue poses a recurring question that this Court should resolve. For example, this Court has pending before it a petition asking the related question, whether a district court or appellate court, when considering a summary judgment motion, must examine all evidence in the record at the time of the order's disposition, even if not mentioned by the parties. Skotak v. Tenneco Resins, Inc., 61 U.S.L.W. 3005 (U.S. June 24, 1992).

In order to preserve the losing party's rights on appeal, appellate courts must be limited to review for error in the record as it existed before the trial court at the time its decision was rendered.[7] An appellate court "has no jurisdiction save to correct errors, and it cannot be an error to ignore evidence never presented to the [district] court." *Dictograph*, 231 F.2d at 867. If the appellate court is allowed to become the initial arbiter of fact and law by considering materials not before the district court, then it will have usurped the trial court's function. The reviewing court, which is not intimately familiar with the facts and issues of the case, "cannot be the trier of facts, and particularly it cannot decide a question of fact upon evidence which is not in the record. [The appellate court] cannot make findings of fact different from the allegations of the pleadings and affidavits upon which summary judgment or dismissal was entered below." *Carr v. Corning*, 182 F.2d 14, 21 (D.C. Cir. 1950). The reviewing court must be limited to the record before the district court at the time of its decision.

II. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF THE FLORIDA SUPREME COURT HOLDING THAT A PARTY TO A CONTRACT MAY NOT SUE IN TORT FOR RECOVERY OF AN ECONOMIC LOSS AND IS CONTRARY TO NATIONAL POLICY WHICH FAVORS CONTRACTUAL ALLOCATION OF RISK,

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[7] In the case of Rule 12(b)(6) and 12(c) motions, because only pleadings were properly before the trial court, the appellate court's review must also be limited to the pleadings, which must be accepted as true. United States v. Gaubert, 111 S. Ct. 1267, 1276 (1991); Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). Accordingly, the Eleventh Circuit's consideration of outside materials and failure to accept the allegations of PaineWebber's counterclaim as true is error.

RESPONSIBILITY, AND COMPENSATION BY COMMERCIAL ENTITIES.

The Eleventh Circuit also affirmed the judgment in favor of BankAtlantic on PaineWebber's counterclaim by holding that BankAtlantic could sue in tort for economic damages flowing from an alleged contractual breach. This holding served as the Court's justification for its refusal to permit PaineWebber to recover its attorneys' fees and costs, as agreed to by BankAtlantic in the financial advisor agreement. The Eleventh Circuit's holding that BankAtlantic could sue in tort for these economic losses, and ignore the agreed to contractual remedies, is contrary to the holdings of the Supreme Court of Florida and this Court. The decision also greatly departs from the usual course of judicial proceedings, and from public policy, which encourage alternative dispute resolution mechanisms. If left to stand, the decision would render meaningless contractual alternative dispute resolution mechanisms, by permitting a plaintiff to cloak its claims in tort to recover damages for a contractual breach.

A. The Opinion Recedes From the Economic Loss Rule

The purpose of the economic loss rule is to further the public policy of permitting parties to a contract to allocate their economic risks by agreement. The economic loss rule in Florida is predicated upon this Court's holding in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and was announced in two decisions of the Florida Supreme Court. *See Florida Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987); *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). The decisions hold that there can be no recovery in tort for damages flowing from a contractual breach, absent personal injury or property

damage. In announcing the rule, the Florida Supreme Court held that "contract principles are more appropriate than tort principles to resolve purely economic loss claims." 510 So. 2d at 901.

The rule was adopted by the Florida Supreme Court in *Florida Power & Light v. Westinghouse.* There, an electric utility sued the manufacturer of six steam generators for breach of warranty and negligence. *Id.* The defendant sought and obtained summary judgment on the negligence claims by arguing that, absent personal injury or property damage, the utility was limited to its claims under the parties' contract.

The Florida Supreme Court affirmed the summary judgment entered. In so doing, it relied upon and adopted this Court's decision in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). The Florida Supreme Court held the parties should be limited to their agreed contractual remedies, because this "encourage[d] parties to negotiate economic risks through warranty provisions and price." 510 So. 2d at 901. The court stated that it could find no public policy basis for intruding upon the parties' allocation of risk by contract:

> [T]he purchaser, particularly in a large commercial transaction like the instant case, can protect his interest by negotiation and contractual bargaining or insurance. The purchaser has the choice to forego warranty protection in order to obtain a lower price. We conclude that we should refrain from injecting the judiciary into this type of economic decision-making.

510 So. 2d at 902.

In *East River,* this Court held that contract law, as opposed to tort law, is better suited to commercial controversies, "because the parties may set the terms of their

own agreements." 476 U.S. at 872-73. *East River* was brought by charterers of supertankers seeking to recover the cost of turbine repairs from the turbines' manufacturers. The claims sounded in both contract and tort. This Court rejected the imposition of tort liability, because the parties had agreed to contractual remedies, and there was no injury to persons or property. This Court noted that, in exchange for the limitation on remedies, the purchaser paid less for the manufacturers' product. Therefore, this Court concluded that "we see no reason to intrude into the parties' allocation of the risk." *Id.* at 873.

The Florida Supreme Court's holding in *Florida Power* was extended in *AFM Corp. v. Southern Bell*, 515 So. 2d 180, to cases involving a breach of contract for services. The case was certified to the Florida Supreme Court by the Eleventh Circuit Court of Appeals on the following question:

> Does Florida permit a purchaser of services to recover economic losses in tort without a claim for personal injury or property damage?

515 So. 2d at 180. The court answered the question in the negative. *Id.*

In *AFM*, the Florida Supreme Court extended the doctrine to services. Southern Bell mistakenly rerouted telephone calls directed to AFM. AFM lost substantial business and sued Southern Bell "solely on a tort theory . . . and specifically announced that it was not basing its tort theory on any agreement between the parties." *Id.* at 181. The Florida Supreme Court extended the *Florida Power* decision to a contract for services, and held:

> [W]ithout some conduct resulting in personal injury or property damage, there can be no independent tort flowing from a contractual

> breach which would justify a tort claim solely for economic losses.

Id. at 181-82.[8] The court reiterated the superiority of contractual remedies in such circumstances noting that:

> The contract defined the limitation of liability through bargaining, risk acceptance, and compensation.

Id. at 181.

In this case, there was no personal injury or property damage to BankAtlantic, and therefore no basis for recovery in tort. The parties had allocated their risks in the financial advisor agreement which contained an indemnity provision. The Eleventh Circuit nevertheless held that viable tort claims which stemmed from the breach of a contract existed and therefore refused to enforce the indemnity provision.

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[8] The Eleventh Circuit expressly recognized the status of Florida law in this area in its decision in Interstate Securities Corp. v. Hayes Corp., 920 F.2d 769 (11th Cir. 1991). Nevertheless, in the instant case, the Eleventh Circuit held contrary to *Interstate Securities.*

In *Interstate Securities*, customers of a securities broker sued the broker for breach of contract, negligence, and breach of fiduciary duty in the handling of their options and commodities account. As in *AFM* (and as in this case), the breach of contract claim was abandoned by the plaintiff. *Id.* at 772. The trial court directed a verdict for the broker on the negligence claim on the authority of *AFM*, 547 So. 2d 180. *Interstate Securities*, 920 F.2d at 772. The trial court, however, allowed the breach of fiduciary duty claim to go to the jury. The jury returned a verdict in favor of the broker, and the customers appealed. *Id.* at 773. On appeal, the Eleventh Circuit affirmed "the district court's holding that the *AFM* doctrine bars [the customers'] negligence claims" and further "that *AFM* also bars the claims regarding breach of fiduciary duty." *Id.* The Eleventh Circuit explained that when parties have defined their relationship and respective duties by a contract, no tort claims lie absent property damage "outside the scope of the contract between the parties." *Id.* at 775. In the present case, another panel of the Eleventh Circuit held contrary to this rule.

B. The Eleventh Circuit's Opinion Is Contrary to National Policy Which Fosters Alternative Dispute Resolution Including the Use of Contractual Remedies

The Eleventh Circuit's opinion, if left to stand, would render meaningless contractual provisions requiring alternative dispute resolution. The door would re-open the floodgates of tort claims designed to circumvent contractual provisions which limit liability, allocate economic risks, and provide for alternative dispute reso'ution mechanisms.

America is experiencing a "litigation explosion" that is crippling the federal civil docket. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A.J. 274, 275 (1982). The United States Court of Appeals for the First Circuit characterized the civil docket as being in a state of "rampant growth" and "hypertrophy":

> [A] pathological "overgrowth . . . of an organ or part . . . resulting from unusually steady or severe use."

Securities Indus. Ass'n v. Conolly, 883 F.2d 1114, 1116 (1st Cir. 1989) (citing Webster's Third New World Dictionary 114 (1981)).

In 1989, almost 18 million new civil cases were filed in state and federal courts — "one lawsuit for every ten adults." President's Council on Competitiveness, *Agenda for Civil Justice Reform in America* 1 (1991) [hereinafter President's Council]. In the last 30 years, the number of lawsuits filed each year in the federal courts has tripled. *Id.*

This litigation explosion has not been without its costs. Individuals, business, and governments have spent "a total of up to $300 billion" on direct and indirect litigation costs. *Id.* More importantly, "the civil justice

system as we know it today is not fulfilling its basic objective of providing the 'just, speedy and inexpensive' resolutions of disputes." S. Rep. No. 416, 101st Cong., 2d Sess. 7 (1990) (citing Fed. R. Civ. P. 1).

As a result, the judicial system has been under attack from all quarters. Vice President Quayle warned:

> The costs of [the litigation explosion] are immense, not only for the individuals who find themselves in court, but for American business and the economy at large. And, the problem poses a long-run threat to public confidence in our legal system.

Vice President Dan Quayle, Address Before the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 137 (1991). Laurence H. Silberman, former deputy attorney general of the United States, likewise has stated:

> The legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy.

Lawrence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, Regulation, Mar.-Apr. 1978, at 15. Another commentator observed:

> In recent years the federal courts have been increasingly mired in congestion, delay, and high litigation costs .... Indeed, by 1983 these problems had become severe enough to raise questions about the viability of the federal civil justice system and even the continuing worth of the Federal Rules.

. . . .

> . . . [The] system [is] so indulgent of dubious claims, defenses, and behavior that it fell prey to adversarial ethics, crowded dockets, rising litigation costs, abusive discovery, and holdup litigation.

Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure,* 67 N.C.L. Rev. 1023, 1023-24, 1028-29 (1989) (citations omitted) [hereinafter Louis].[9]

In response to this criticism, former Chief Justice Burger stated:

> "With court congestion and excessive litigiousness drawing increasing criticism, it is clear that lawyers in the future will have to be trained to explore nonjudicial routes to resolving disputes."

Warren E. Burger, *Isn't There a Better Way,* 68 A.B.A.J. 274, 275 (1982) (citation omitted).

Commentators, politicians, and interest groups have recommended a panoply of reforms to address the problem. Louis, *supra.* The President's Council on Competitiveness has recommended an array of reforms including promoting voluntary dispute resolution and adopting a "loser pays" rule for attorneys' fees in diversity cases. President's Council at 7, 8-9, 15, 24-25.

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[9] Judge Bork observed: "we are thrusting a workload upon the courts that forces them towards an assembly line model." Robert H. Bork, Dealing with the Overload in Article III Courts, Address Before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, 70 F.R.D. 231 (1976).

The problem is so acute that Congress enacted the Civil Justice Reform Act, 28 U.S.C. §§471-82 (1992). The Act requires the district courts to implement a civil justice expense and delay reduction plan to address the problems resulting from the litigation explosion. 28 U.S.C. §471. One of the "cornerstone principles" of the Act is "expanding and enhancing the use of alternative dispute resolution." S. Rep. No. 416, 101st Cong., 2d Sess. 14 (1990). Senator Joseph Biden, Chairman of the Senate Judiciary Committee, commented: "We need this legislation to establish a *statutory national policy* for addressing the problems of litigation costs and delay . . . ." *Id.* at 31 (emphasis added).

The courts already have many tools available to them to stem the litigation explosion, including some of those that have been recommended. The enforcement of arbitration agreements is one means by which courts may curtail their ever increasing caseload. Indeed, federal policy strongly favors arbitration as an alternative dispute resolution process. *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989); *Wilko v. Swan*, 346 U.S. 427, 431-32 (1953), *overruled on other grounds, Rodriguez*, 490 U.S. 477 ("The United States Arbitration Act establishes the desirability of arbitration as an alternative to the complications of litigation") (citing H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2; S. Rep. No. 536, 68th Cong., 1st Sess. 3); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 248 (2d Cir. 1991). Arbitration is "a contractual device that relieves some of the organic pressure [of the growing civil docket] by operating as a shunt, allowing the parties to resolve disputes outside of the legal system." *Securities*, 883 F.2d at 1116.

The federal courts also are armed with Rule 11 to sanction and deter frivolous lawsuits. In this regard, this Court has held:

> It is now clear that the central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts.

Cooter & Gell v. Hartmarx, 496 U.S. 384 (1990).

Rule 68, similar to indemnification, allows for the shifting of the prevailing party's costs, and in some cases fees, to the losing party. Indeed, this Court has emphasized the deterrent value of forcing the losing party to indemnify the prevailing party for the costs and fees that it incurs:

> To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates.

Marek v. Chesny, 473 U.S. 1, 11 (1985).

The enforcement of contracts additionally deters baseless filings. Commentators have observed that the failure of some courts to enforce contracts has contributed significantly to the litigation explosion:

> The death of contract (as Gilmore famously called it) was full of implications for the sense of individual responsibility. If courts no longer thought it as important as they once did that people live up to their solemn promises, at least when the promise in question was a promise not to litigate in some way, people would themselves come to attach less importance to choice and agreement as sources of rights. And the major

source of rights other than choice and agreement is the litigation industry.

> The death of contract was of broad significance for the litigation explosion in another way as well. The self-correcting tendency, the resilience, of the old legal system had been undercut; a penny had been put in the fuse box. Henceforth lawyers could ask courts not only to decree a vague duty or a procedural imposition, but to squash all responsive attempts to provide specificity to the new duty or waive the burdensome procedure. The last and most important exit was now closed.

Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed The Lawsuit*, 218-19 (1991).[10]

The independent tort doctrine and the economic loss rule are designed to preclude tort claims where the action arises out of a contractual relationship. Moreover, the economic loss rule holds that such actions should be governed by contract, rather than tort, principles thereby allowing the parties to negotiate the economic ramifications of a breach of their agreement.

Courts could stem the litigation explosion, and the resulting criticism, by utilizing the tools available to them. This case manifests in microcosm the failure of some courts to address this crisis and discourage the

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[10] The decline in contract law additionally has burdened the American economy. "[T]here are tremendous problems with substantive law, problems that undermine our competitiveness. For example, much has been written about the decline of contract law. One author wrote some years ago about the death of contract and the rise of tort litigation in its place." Dan Quayle, Address Before the Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 140 F.R.D. 137, 139 (1991).

filing of frivolous claims — thereby adding to the already overcrowded federal civil docket.

In short, the district court failed to enforce the contracts negotiated by the sophisticated parties involved in this action. PaineWebber filed a motion to dismiss, and later, a motion for summary judgment on BankAtlantic's tort claims on the basis of the independent tort doctrine and the economic loss rule. The district court denied PaineWebber's motions. A-83, 54.

Subsequently, the district court and the Eleventh Circuit denied PaineWebber's contractual right to indemnification. A-51-52, 28-29. The indemnification agreement was negotiated between two sophisticated parties. The purpose of the indemnification agreement was to deter actions by successful corporate raiders, such as BankAtlantic and its chairman, Alan Levan.

As a result of the district court's failure to enforce the contract by not applying the economic loss rule and refusing indemnification, scarce judicial resources were wasted during the five week jury trial of this action. Not surprisingly, the jury responded by denying each of BankAtlantic's claims exclaiming that the action was "frivolous" and that they "were sorry to see the case in court."

After BankAtlantic's officers admitted at trial that BankAtlantic had not suffered any loss or damage, and its senior management acknowledged that they were fully aware of the "risks" associated with the interest rate swaps, PaineWebber requested that the district court enter Rule 11 sanctions. Despite this testimony revealing that BankAtlantic knew that its claims were frivolous, the district court denied PaineWebber's motion. A-32.

The enforcement of PaineWebber's contractual right to indemnification, much like the operation of Rule 11 and

Rule 68, would have caused BankAtlantic, and future potential plaintiff's, to "think very hard" about whether to bring contrived actions. *Marek v. Chesny*, 473 U.S. 1, 11 (1985); *see also Cooter & Gell v. Hartmarx*, 496 U.S. 384 (1990) ("central purpose of Rule 11 is to deter baseless filings in District Court and thus . . . streamline the administration and procedure of the federal courts").

Pursuant to the Civil Justice Reform Act, there is a "statutory national policy" of "expanding and enhancing the use of alternative dispute resolution," such as indemnification agreements.[11] The Eleventh Circuit ignored this policy by refusing to enforce the indemnification provisions. As with arbitration agreements, indemnification agreements should be construed broadly in order to deter baseless claims and fulfill the national policy recognized in the Civil Justice Reform Act:

> The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or in the allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25 (1983) (citations omitted).

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[11] As set forth *supra*, Chairman Biden explained that the Civil Justice Reform Act is necessary "to establish a *statutory national policy* for addressing the problems of litigation costs and delay . . . ." S. Rep. No. 416, 101st Cong., 2d Sess. 31 (1990) (emphasis added). One of the cornerstones of the act is "expanding and enhancing the use of alternative dispute resolution." *Id.* at 14. Indemnification, as a "disincentive to litigate," is a form of alternative dispute resolution, which includes "all the penalties and cost assessment devices that can be applied against a party who chooses to litigate." Frances E. Zollers, *Alternative Dispute Resolution and Product Liability Reform*, 26 Am. Bus. L.J. 479, 487-88 (1988).

CONCLUSION

For the reasons stated herein, petitioner PaineWebber Incorporated requests that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,
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92-571

Supreme Court, U.S.
FILED
SEP 30 1992
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5142

BANKATLANTIC, a federal savings bank,
f/k/a Atlantic Federal Savings and Loan Association of
Ft. Lauderdale,

Plaintiff-Counterclaim
Defendant-Appellee,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,

Defendant-Counterclaim
Plaintiff-Appellant.

No. 90-5162

BANKATLANTIC, A Federal Savings Bank
f/k/a Atlantic Federal Savings & Loan Association
of Ft. Lauderdale,

Plaintiff-Appellant,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER,

Defendant-Appellee.

No. 90-5776

BANKATLANTIC, A Federal Savings Bank
f/k/a Atlantic Savings & Loan Association
of Ft. Lauderdale,
Plaintiff-Appellant,

versus

BLYTHE EASTMAN PAINEWEBBER, INC.,
Defendant-Appellee.

No. 90-5979

BANKATLANTIC, A Federal Savings Bank
f/k/a/ Atlantic Federal Savings & Loan Association
of Ft. Lauderdale,
Plaintiff-Appellee,

versus

BLYTHE EASTMAN PAINE WEBBER, INC.,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Florida

BEFORE: EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

PER CURIAM:

BankAtlantic's Petition for Rehearing is denied.
ENTERED FOR THE COURT:

United States Circuit
Judge

* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

BANKATLANTIC, a federal savings bank, f/k/a Atlantic Federal Savings and Loan Association of Ft. Lauderdale, Plaintiff-Counterclaim Defendant-Appellee,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., Defendant-Counterclaim Plaintiff-Appellant.

BANKATLANTIC, A Federal Savings Bank f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale, Plaintiff-Appellant,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., n/k/a Painewebber, Defendant-Appellee.

BANKATLANTIC, A Federal Savings Bank f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale, Plaintiffs-Appellees,

v.

BLYTHE EASTMAN PAINE WEBBER, INC., Defendant-Appellant.

Nos. 90-5142, 90-5162, 90-5776 and 90-5979.

United States Court of Appeals,
Eleventh Circuit.

March 23, 1992.

Savings and loan association sued financial advisor which had also served as broker in "interest rate swaps." The United States District Court for the Southern District of Florida, No. 87-6643 Civ-TES, Thomas E. Scott, J., entered judgment on jury verdict for broker and, 130 F.R.D. 153, denied association's motion for new trial. Association appealed, and broker appealed from judgment on pleadings entered against it on its counterclaim

and from denial of its motion for sanctions and attorney fees. The Court of Appeals, Atkins, Senior District Judge, sitting by designation, held that: (1) evidence supported jury's determination that broker did not breach fiduciary duty or engage in negligence or fraud; (2) extrinsic evidence in form of newspaper article read by jury foreman did not pose reasonable possibility of prejudice, and association was not entitled to new trial on basis of other grounds asserted; (3) Florida's "economic loss rule" did not bar association's tort claims; and (4) district court properly interpreted indemnity provision to apply only to third-party claims.

Affirmed.

1. Federal Courts ⇦ 765

Court reviewing order denying motion for entry of judgment notwithstanding verdict (j.n.o.v.) applies the same standard used by district court when considering motions for directed verdict or for j.n.o.v.

2. Federal Courts ⇦ 799

Court determining whether record contains substantial evidence supporting jury verdict must view evidence, and all logical inferences therefrom, in light most favorable to appellee.

3. Brokers ⇦ 38(4)

Evidence supported jury's determination that broker for savings and loan association did not breach fiduciary duty or commit negligence or fraud by failing to disclose risks associated with "interest rate swaps," its relationship with counterparty to swaps, or counterparty's financial problems; savings and loan was aware of those risks and of that relationship, and counterparty was

creditworthy so broker did not have to advise association to obtain collateral.

4. Federal Civil Procedure ⇦ 2334

Extrinsic evidence in form of newspaper article read by jury foreman, containing extraneous information about savings and loan association and its chairman and information on association's litigation with minority shareholder which had been excluded as evidence from trial, did not pose reasonable possibility of prejudice to association so as to entitle it to new trial in its suit against broker in interest rate swaps.

5. Federal Civil Procedure ⇦ 2337

To obtain new trial based on inaccurate juror responses during voir dire, party must first demonstrate that juror failed to answer honestly material question on voir dire and then further show that correct response would have provided valid basis for challenge for cause; first prong of test requires determination of whether juror was aware of fact that his answers were false, and second prong requires showing of actual bias.

6. Federal Civil Procedure ⇦ 2337

Savings and loan association was not entitled to new trial based on jurors' allegedly false responses during voir dire in its suit against broker in interest rate swaps, including one juror's concealment of fact that he was employed by law school classmate of one of broker's trial counsel and the other juror's concealment of several criminal convictions and entry of civil judgment against him; there was no express admission of actual bias, and jurors were not closely connected to case or to either party.

7. Federal Courts ⇦ 823

In reviewing evidentiary determinations, Court of Appeals will not disturb district court's rulings absent clear showing of abuse of discretion.

8. Federal Civil Procedure ⇦ 2651

Standard for determining whether jury verdict should be set aside as result of misconduct of counsel is whether conduct was such as to impair gravely the calm and dispassionate consideration of case by jury.

9. Federal Civil Procedure ⇦ 2332

Savings and loan association suing broker in interest rate swaps was not entitled to new trial based on broker's alleged attack on association's chairman during direct examination and closing argument through introduction of evidence of chairman's compensation, reference to chairman as "corporate raider," and claim that chairman had "cooked the books" to hide association's losses from swaps so that $3 million dividend could be paid to him personally.

10. Federal Courts ⇦ 823

Decision to admit or exclude expert testimony is matter within district court's discretion and will not be reversed unless it is manifestly erroneous.

11. Federal Civil Procedure ⇦ 2334

District court's decision to admit testimony of broker's expert in suit by savings and loan association arising out of interest rate swaps was not manifestly erroneous and did not require new trial; record reflected no "intractable conflict" between expert's trial testimony and her earlier deposition, and association was able to use

that deposition during cross-examination and had full and fair opportunity to establish any inconsistencies.

12. Federal Civil Procedure ⇦ 2011

District judges have broad discretion with respect to admissibility of evidence.

13. Witnesses ⇦ 389

When witness admits making prior inconsistent statement, extrinsic proof of statement is excludable.

14. Evidence ⇦ 558(7)

District court could refuse to admit in evidence draft of article that expert witness had written which allegedly contained statements that were inconsistent with her trial testimony; at trial, expert admitted having made statements in article but explained that they were consistent with her testimony.

15. Action ⇦ 27(1)

Under Florida "economic loss rule," party to contract cannot raise tort claims to recover solely economic damages flowing from breach of contract unless tort is independent of contract breach.

See publication Words and Phrases for other judicial constructions and definitions.

16. Action ⇦ 27(5)

Florida's economic loss rule did not bar savings and loan's tort claims against broker in interest rate swaps, as swaps were not encompassed in contract that association entered into with broker.

17. Federal Courts ⇦ 776

Contract interpretation is legal question subject to de novo review by Court of Appeals.

18. Indemnity ⇦ 15(9)

Construction of indemnity agreement generally is question of law for court applying generalized principles of contract construction.

19. Indemnity ⇦ 9(2)

District court properly interpreted indemnity provision in agreement between savings and loan association and broker in interest rate swaps to apply only to third-party claims and properly dismissed broker's counterclaim for attorney fees accordingly.

20. Costs ⇦ 2
Federal Civil Procedure ⇦ 2771(2)

Broker in interest rate swaps was not entitled to sanctions and attorney fees under Florida statute or federal Rule 11 in suit by savings and loan association. West's F.S.A. § 57.105; Fed.Rules Civ.Proc.Rule 11, 28 U.S.C.A.

John H. Schulte, Paul McMahon, Jorden, Schulte & Burchette, Miami, Fla., for Blythe Eastman Paine Webber, Inc.

Eugene E. Stearns, Bradford Swing, Miami, Fla., for Bankatlantic.

Appeals from the United States District Court for the Southern District of Florida.

Before EDMONDSON and DUBINA, Circuit Judges, and ATKINS*, Senior District Judge.

ATKINS, Senior District Judge:

BankAtlantic appeals from a judgment entered on a jury verdict and from denial of two post-trial motions relating to juror misconduct. Blythe Eastman Paine Webber Inc., n/k/a PaineWebber Inc. ("PaineWebber"), appeals from a judgment on the pleadings entered against it on its counter-claim and from denial of its motion for sanctions and attorney's fees. We find sufficient evidence to sustain the jury's verdict, no abuse of discretion in the denial of BankAtlantic's motions for new trial, 130 F.R.D. 153, and PaineWebber's motion for sanctions, and no error in granting judgment on the pleadings in favor of BankAtlantic on PaineWebber's counterclaim. Accordingly, we AFFIRM.

A. BACKGROUND

BankAtlantic is a federally chartered savings and loan institution. At the time of this litigation, it was one of the largest savings and loan institutions in Florida and in the United States. In 1984, BankAtlantic retained PaineWebber as a financial advisor to assist it in blocking several hostile takeover attempts. PaineWebber also served as a broker in two transactions known as interest rate swaps.[1] Based on PaineWebber's recommendation, BankAtlantic entered into the two interest rate swaps

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

[1] An interest rate swap is an agreement by which one party agrees to pay the counterparty a fixed rate of interest on a notional amount for a specified period of time. In return, the counterparty agrees to pay the first party an adjustable rate of interest on the same notional amount for the same period of time.

with Homestead Savings ("Homestead") in an effort to hedge its adjustable rate deposit payables against an increase in interest rates. Alleging non-performance under the agreement, BankAtlantic terminated the services of PaineWebber as financial advisor and employed another firm to assist with the interest rate swaps. During this time, interest rates were falling drastically, allegedly causing BankAtlantic to suffer losses in excess of $30 million.

In August 1987, BankAtlantic brought suit against PaineWebber alleging these losses were caused by PaineWebber's failure to disclose the risks involved in interest rate swaps, e.g., that if interest rates fell, the high yielding fixed rate mortgages would be prepaid as borrowers refinanced. BankAtlantic also alleged that PaineWebber failed to disclose its extensive relationship with Homestead, that Homestead was not creditworthy and therefore that BankAtlantic should have obtained collateral from Homestead. The complaint alleged breach of contract,[2] breach of fiduciary duty, fraud, fraudulent concealment, negligence, and negligent misrepresentation.

PaineWebber served an answer denying liability and filed a counterclaim for recovery of fees and costs on the theory that it was entitled to indemnification under the terms of the agreement between the parties. The district court granted judgment on the pleadings in favor of BankAtlantic as to the counterclaim. On November 13, 1989, after a five-week trial, the jury returned a verdict in favor of PaineWebber.

In February 1990, BankAtlantic appealed the final judgment in favor of PaineWebber; PaineWebber ap-

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[2] BankAtlantic abandoned its breach of contract claim at trial and the district court dismissed that claim with prejudice.

pealed from the final judgment against it on the counterclaim. Around this time, BankAtlantic filed a motion for a new trial based upon newly discovered evidence that one of the jurors had read a newspaper article about BankAtlantic during the trial. The district court requested that the appeals be stayed and ordered an evidentiary hearing on the matter, which included an in camera interview of the jurors. On April 16, 1990, BankAtlantic filed a supplemental motion for new trial claiming that two of the jurors failed to give correct responses on voir dire. The district court denied both motions. BankAtlantic appealed that order, which was consolidated with the two previous appeals.[3]

On October 11, 1990, PaineWebber filed a motion for sanctions and attorney's fees, arguing that BankAtlantic's suit was frivolous because it suffered no injury or loss and because BankAtlantic was fully aware of how interest rates fluctuate and mortgages function. The district court denied PaineWebber's motion and PaineWebber appealed.

B. DISCUSSION

1. *The Motion for Judgment Notwithstanding the Verdict or for a New Trial*

[1,2] A court reviewing an order denying a motion for entry of judgment notwithstanding the verdict applies the same standard used by a district court when consider-

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[3] PaineWebber's appeal from the district court's order granting BankAtlantic judgment on the pleadings on the counterclaim, Case No. 90-5142, has been consolidated with BankAtlantic's appeal from the jury's final judgment, Case No. 90-5162, and with BankAtlantic's appeal from the district court's denial of BankAtlantic's motion for a new trial, Case No. 90-5776.

ing motions for directed verdict or for j.n.o.v. The Eleventh Circuit has set forth the standard in detail:

> If the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied and the case submitted to the jury. A mere scintilla of evidence is insufficient to present to the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict of substantial evidence to create a jury question.

Von Stein v. Brescher, 904 F.2d 572, 578 (11th Cir.1990) (quoting *Boeing Company v. Shipman*, 411 F.2d 365, 374-75 (5th Cir.1969) (en banc). A court determining whether the record contains substantial evidence supporting the jury verdict must view the evidence, and all logical inferences therefrom, in the light most favorable to the appellee. *Smith v. PAPP Clinic, P.A.*, 808 F.2d 1449, 1452 (11th Cir. 1987).

[3] BankAtlantic advances several grounds in support of its argument that the district court erred in denying its motion for judgment notwithstanding the verdict or for a new trial. First, PaineWebber had a fiduciary duty pursuant to the financial advisory agreement it entered with BankAtlantic. Second, despite the duty it owed to BankAtlantic, PaineWebber did not disclose the risks associated with interest rate swaps. Third,

PaineWebber failed to disclose either its relationship with Homestead—the counterparty to the swaps—Homestead's financial problems. Fourth, it was undisputed that BankAtlantic's loss occurred because of PaineWebber's concealment of the risks from BankAtlantic. In sum, BankAtlantic contends that the jury's verdict was contrary to the substantial evidence presented at trial regarding PaineWebber's breach of fiduciary duty, negligence and fraud.

Having reviewed the voluminous record in the appropriate light, we determine the record contains substantial evidence to support the jury's verdict. The evidence showed that BankAtlantic was aware of the risks associated with the interest rate swaps, such as rate fluctuations and prepayment of mortgages. Indeed, Donald Streeter, the president and chairman of BankAtlantic, testified that he and Gerald Roberts, BankAtlantic's senior vice-president, had discussed the interest rate swaps. In addition, the record shows that in January 1984 PaineWebber made a full presentation to BankAtlantic's board of directors, which included a discussion of the effect of rising and falling interest rates.

The record also contains substantial evidence that BankAtlantic knew of PaineWebber's relationship with Homestead. Mr. Streeter indicated that he was aware that PaineWebber had recently brokered a $125 million CD offering for Homestead and that he knew that it was common for a broker to match its customers in a transaction. There also was evidence to refute the claim that Homestead was not creditworthy and that PaineWebber should have advised BankAtlantic to obtain collateral from Homestead. Lawrence Weisberg, Homestead's chairman of the board, testified that Homestead had been in business for over a century and that it continued to be profitable throughout the 1980s. Jim Hunter, BankAtlan-

tic's chief investment officer, and Walid Chammah of PaineWebber, testified that it was BankAtlantic that refused to enter into a collateralized swap with Homestead. Mr. Streeter testified that no one at BankAtlantic felt the need for collateral.

Finding substantial evidence to support the jury's verdict, we conclude that the district court did not err in denying BankAtlantic's motion.

2. *The Motions for New Trial Based on Alleged Juror Misconduct*

After filing its appeal of the final judgment, BankAtlantic filed two additional motions for new trial based on newly discovered evidence relating to alleged juror misconduct. The first of these recited that jury foreman Anthony Lippert had read, in violation of an express court order, an article that containing extraneous information about BankAtlantic and its chairman, Alan Levan. The article included a discussion of Mr. Levan's income in the context of BankAtlantic's poor earnings. The article also contained information on BankAtlantic's litigation with a minority shareholder which had been excluded as evidence from trial.

The second motion was based on alleged false responses by two members of the jury panel. Specifically, BankAtlantic alleged that Anthony Lippert concealed that he was a real estate salesman employed by a law school classmate of one of PaineWebber's trial counsel, and that John Chanquet concealed that several criminal convictions and a civil judgment had been entered against him. As noted, the district court held an evidentiary hearing and thereafter denied both motions.

(a) Juror Exposure to Extrinsic Evidence

[4] A juror's consideration of extrinsic evidence requires a new trial "if the evidence poses a *reasonable possibility of prejudice* to the defendant." *United States v. Rowe*, 906 F.2d 654, 656 (11th Cir.1990) (quoting *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir.1984)). The defendant must first establish prejudice by a preponderance of credible evidence. If and when a defendant makes this showing, the burden shifts to the plaintiff to prove that the juror's consideration of the extrinsic evidence was harmless. *Id.* at 657. The factual determination of whether consideration of extrinsic evidence caused the defendant prejudice is committed to the trial court's "large discretion." *Id.* (quoting *Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959)).

This court previously considered a motion for a new trial based on a jury's exposure to a newspaper article in *United States v. Bolinger*, 837 F.2d 436 (11th Cir.), *cert. denied*, 486 U.S. 1009, 108 S.Ct. 1737, 100 L.Ed.2d 200 (1988). After the jury returned a verdict of guilty on drug possession and distribution charges, the defendants learned that one juror had read a newspaper article containing information that had been suppressed as evidence by the trial judge. *Id.* at 440. One juror overheard another's comments regarding the substance of the article, specifically that a raid on the defendant's home had uncovered several hundred thousand dollars in a mattress. The other jurors heard only references to the article itself. *Id.*

Despite the inflammatory nature of the information reported in the article, the Eleventh Circuit concluded that the evidence against the defendant was so overwhelming that the introduction of the extrinsic evidence could not have been prejudicial. *Id.* The court distin-

guished *United States vs. Williams*, 568 F.2d 464 (5th Cir. 1978), which involved several jurors' hearing a television news report that the defendant had been previously convicted of the same offenses. *Id.* at 470-71. The *Williams* court had found the news report so prejudicial that the jurors' statements that they could disregard the newscast were "insufficient to obviate the problems of fairness caused by the news report." *Id.* at 471. The *Bolinger* court explained the differences between the two cases as follows:

> Given the facts and circumstances of this case, juror Hunter's dissemination of information regarding money allegedly found under [the defendant's] mattress does not require a new trial. This information, although suppressed as evidence by the district court, is not nearly as inflammatory as the information involved in *Williams*. As such, its dissemination does not, as a matter of law, obviate the importance of the juror's testimony that the information had no effect on their verdict. The district court heard this testimony, and its evaluation of this testimony is entitled to great weight.

837 F.2d at 440 (citations omitted).

In light of this precedent, we conclude that the district court properly determined that the extrinsic evidence did not pose a "reasonable possibility of prejudice." *Rowe*, 906 F.2d at 656. As in *Bolinger*, only one juror read the newspaper article in question; none of the other jurors had any knowledge of the contents of the article. Also, the information regarding Mr. Levan's income and BankAtlantic's litigation with a minority shareholder was not nearly as inflammatory as the news report in *Williams* about the defendant's previous conviction on the same charges. The district court's determination that the evidence was not prejudicial is supported as well by its

finding that the facts reported in the article would have been merely cumulative of facts already in evidence[4]. Finally, the district court found credible the jurors' testimony that the information had no effect on their impartiality.

The trial evidence, along with the jurors' post-trial testimony, supports the district court's determination that BankAtlantic was not prejudiced. Accordingly, the district court did not abuse its "large discretion" in concluding that the juror's consideration of the extrinsic evidence did not taint the jury's deliberations and require a new trial. *Rowe*, 906 F.2d at 657.

(b) Non-Disclosure During Voir Dire

[5] The standard for determining when inaccurate juror responses necessitate a new trial was set forth in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984): "To obtain a new trial . . . a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." The first prong of the *McDonough* test requires a determination of whether the juror's answers were honest, "that is, whether he was aware of the fact that his answers were false." *United States v. Perkins*, 748 F.2d 1519, 1531 (11th Cir.1984). The second prong, that a correct response would have provided a valid basis for a challenge for cause, requires a showing of actual bias. *Id.* at 1532; *see also United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir.1988).

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[4] The district court noted that it had excluded the facts in the article relating to the shareholder suit because the information was irrelevant, not because it was prejudicial.

[6] In this case, the district court assumed that the jurors' answers were not honest for purposes of BankAtlantic's motion. We need not reach that question because the district court properly found that BankAtlantic failed to show that correct responses from Lippert or Chanquet would have provided a valid basis for a challenge for cause. As noted, in order to satisfy the second prong of the *McDonough* test, this circuit requires a showing of actual bias. *Perkins*, 748 F.2d at 1532 (citing *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir.), *cert. denied*, 464 U.S. 855, 104 S.Ct. 174, 78 L.Ed.2d 156 (1983)). "Actual bias may be shown in two ways: 'by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed.'" *Id.* (*quoting United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir.1976)). For example, in *Perkins*, the record contained numerous indications of the juror's bias, including his dishonesty, his concealment of the fact that he knew the defendant[5] and his past involvement in similar litigation. *Id.* at 1532-33.

In the instant case, there was no express admission of actual bias. In addition, jurors Lippert and Chanquet were not closely connected to the case or to either party. BankAtlantic makes much of juror Lippert's employment with a former classmate of one of Painewebber's attorneys, but provides no specific facts that would create a presumption of bias. Unlike the juror in *Perkins*, there is

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[5] In fact, the juror's conduct in *Perkins* went beyond mere nondisclosure:

> although [the juror] did not recall knowing [the defendant] or being on a committee with him during voir dire, he remembered this association during trial and jury deliberations, but then forgot about it again during the post-trial hearing until the testimony of his fellow jurors reminded him. We do not find this sequence credible.

748 F.2d at 1532.

no evidence that Lippert or Chanquet felt compelled to misrepresent themselves, that they knew either party, or that they were ever involved in similar litigation. Furthermore, as the Supreme Court stated in *McDonough*, "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can be said to affect the fairness of a trial." 464 U.S. at 556, 104 S.Ct. at 850. As the district court noted, neither Lippert nor Chanquet had a motive to conceal information just to get on the jury and find against BankAtlantic. There was no indication that either juror could not be impartial. Because BankAtlantic has failed to show actual bias, the district court did not abuse its discretion in denying the motion for new trial.

3. *The Alleged Attack on Alan Levan as a Basis for a New Trial*

BankAtlantic asserts that it is entitled to a new trial because of the alleged attack on Alan Levan during PaineWebber's direct examination and during closing argument. Specifically, BankAtlantic argues that PaineWebber's counsel improperly accused Mr. Levan of not coming to the stand during BankAtlantic's case, of personally owning BankAtlantic and of being a corporate raider. BankAtlantic also argues that evidence of Levan's income should have been excluded because it was irrelevant and highly prejudicial in violation of Federal Rules of Evidence 402 and 403.

In response, PaineWebber contends that evidence of Mr. Levan's financial dealings with BankAtlantic was admissible not only to measure credibility and bias, but because it went directly to PaineWebber's defense that Mr. Levan and his colleagues consciously sold the mortgages to which the interest rate swaps were matched.

[7, 8] In reviewing evidentiary determinations, we will not disturb a district court's rulings absent a clear showing of an abuse of discretion. *Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 645 (11th Cir.1990). The standard for determining whether a jury verdict should be set aside as a result of misconduct of counsel is whether the conduct was "such as to impair gravely the calm and dispassionate consideration of the case by the jury." *Allstate Insurance Co. v. James*, 845 F.2d 315, 318 (11th Cir.1988) (citation omitted). The trial judge is given broad discretion in controlling counsel's arguments. Absent an abuse of discretion, the decision of the trial court, "which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed." *Id.*

The cases cited by BankAtlantic in support of its argument, e.g., *Koufakis v. Carvel*, 425 F.2d 892 (2d Cir.1970), and *McWhorter v. City of Birmingham*, 906 F.2d 674 (11th Cir.1990), are distinguishable. In *Carvel*, the court ordered a new trial based on grossly improper and inflammatory references made by plaintiff's counsel that were "wholly unjustified by anything in the record." 425 F.2d at 901. Specifically, during the trial counsel likened the defendant to a Mafia don several times, characterized the defendant as vastly wealthy and the case as one of a "little" and virtuous man of modest resources against a powerful and unscrupulous man of untold wealth, and remarked frequently that the defendant had failed to testify. *Id.* at 902. "Moreover, . . . [counsel] continually referred to matters which were not in the record and which were not relevant." *Id.* at 901. *See also Gonzalez v. Volvo of America Corp.*, 734 F.2d 1221, 1225-26 (7th Cir.1984) (ordering new trial where counsel repeatedly referred to defendant's corporate size, portrayed it as preying on innocent consumers and referred to matters outside of the record solely to arouse jurors'

sympathy); *McWhorter v. City of Birmingham*, 906 F.2d 674, 676-77 (11th Cir.1990) (affirming district court's decision to grant new trial because counsel's closing argument focused on theory eliminated during pretrial conference and on evidence expressly excluded by trial judge).

[9] In contrast to *McWhorter*, PaineWebber did not introduce any evidence in violation of a ruling by the district court. Unlike the remarks in *Carvel* and *Gonzalez*, we cannot say that PaineWebber's references to Mr. Levan were either "wholly unjustified by anything in the record" or irrelevant. PaineWebber introduced evidence of Levan's compensation and referred to him as a "corporate raider." PaineWebber also claimed that Levan had "cooked the books" to hide BankAtlantic's losses from the interest rate swaps so that a $3 million dividend could be paid to him personally. While some of the arguments could be viewed as improper, they did not appear to be references to matters outside the record. Rather, PaineWebber's closing argument was based on evidence that was largely adduced from BankAtlantic's own witnesses.

Furthermore, the references to Mr. Levan's income and the $3 million dividend were relevant to support PaineWebber's contention that the payment of the high salaries and the dividend occurred at the same time that BankAtlantic claimed it had suffered staggering losses due to the interest rate swaps. The evidence of Mr. Levan's financial dealings with BankAtlantic also was relevant to PaineWebber's claim that Mr. Levan and his associates consciously sold the mortgages matched in the interest rate swaps.

The evidence was relevant not only to PaineWebber's defense, but also to show Mr. Levan's bias or interest in

the outcome of the case.[6] "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (citations and quotations omitted). Given Mr. Levan's financial interests in BankAtlantic, he clearly had a stake in the outcome of the litigation.

Contrary to BankAtlantic's contention, the district court did not abuse its discretion in admitting the evidence elicited during Mr. Levan's direct examination or in allowing PaineWebber's counsel to make the references to Mr. Levan during closing argument.

4. *The Alleged Error in Excluding Impeachment Evidence of PaineWebber's Expert Witness Tanya Beder*

BankAtlantic seeks a new trial on the ground that Tanya Beder, PaineWebber's expert witness, gave opinion testimony at trial which directly conflicted with the opinion she gave at her deposition and with statements she

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[6] BankAtlantic claims that PaineWebber called Mr. Levan as a witness solely to inflame the jury with information about his income and the image of him as a "corporate raider," which is an abuse of Federal Rule of Evidence 607.

Rule 607 provides: "The credibility of a witness may be attacked by any party, including the party calling the witness." Fed.R.Evid. 607. However, under Rule 607 a witness may not be called to the stand solely for the purpose of impeaching him and thereby obtaining testimony that is otherwise inadmissible. *Balogh's of Coral Gables, Inc. v. Getz*, 798 F.2d 1356, 1358 n. 2 (11th Cir.1986); *See generally* Sheila A. Skojec, Annotation, *Propriety, under Federal Rule of Evidence 607, of Impeachment of Party's Own Witness*, 89 A.L.R.Fed. 13 (1988).

BankAtlantic's argument is without merit. As discussed above, the testimony PaineWebber elicited from Mr. Levan was not "otherwise inadmissible" because it was relevant to its defense.

made in an article she had written.[7] BankAtlantic argues that the district court erred in admitting Ms. Beder's opinion testimony and in refusing to admit a draft of the article into evidence.

(a) Admission of Expert Testimony

[10,11] The decision to admit or exclude expert testimony is a matter within the district court's discretion and will not be reversed unless it is "manifestly erroneous." *United States v. Cross*, 928 F.2d 1030, 1049 (11th Cir.1991); *Stancill v. McKenzie Tank Lines, Inc.*, 497 F.2d 529, 535 (5th Cir.1974). BankAtlantic offers no facts or authority to support its contention that the district court's decision to admit the testimony was manifestly erroneous. In addition, the cases BankAtlantic cites do not support its assertion that a new trial is required. For example, *Harre v. A.H. Robins Co.*, 750 F.2d 1501 (11th Cir.1985), involved a Rule 60(b)(3)[8] motion for a new trial based on the "intractable conflicts" between an expert witness' testimony at trial and his deposition testimony in a later case. *Id.* at 1504. In *Harre*, the witness testified at trial that he had conducted certain

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[7] BankAtlantic alleges that Ms. Beder testified in deposition that the first $35 million swap was hedged against a $35 million stand by commitment for mortgage-backed securities, while the second swap was hedged against $50 million of fixed rate mortgages. At trial, however, she testified that the $85 million of swaps were hedged against a pool of $160,000 million of mortgages with yields of 12% or more. In addition, BankAtlantic claims that Ms. Beder's testimony at trial that the swaps were safe and risk-free hedges conflicted with an article she had written about the high risks of hedging.

[8] Rule 60(b)(3) provides in pertinent part as follows:

> On motion upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Fed.R.Civ.P. 60(b)(3).

experiments; however, during his deposition in a later case, he testified that he had done no experiments. *Id.* The appellants established that the witness had committed perjury and that this misconduct prevented them from fully and fairly presenting their case. *Id.* at 1505. Appellant's reliance on *Harre* is misplaced. The present record reflects no such "intractable conflicts." After having the opportunity to hear all the prior testimony, the court found no merit in BankAtlantic's objection that Ms. Beder's testimony had changed. In further contrast to *Harre,* BankAtlantic was able to use the deposition during cross examination and had a full and fair opportunity to establish any inconsistencies. Under the circumstances of this case, we cannot say that the district court's decision to admit Ms. Beder's expert testimony was "manifestly erroneous" or that a new trial is required.

(b) Exclusion of Article

[12-14] District judges have broad discretion with respect to the admissibility of evidence. *United States v. Roger,* 465 F.2d 996, 997 (5th Cir.), *cert. denied,* 409 U.S. 1047, 93 S.Ct. 517, 34 L.Ed.2d 498 (1972). When a witness admits making a prior inconsistent statement, extrinsic proof of the statement is excludable. *Id.; see also United States v. Greer,* 806 F.2d 556, 559 (5th Cir.1986) (holding taped statement in direct conflict with trial testimony excludable where on cross-examination witness admitted making statement); *United States v. Sisto,* 534 F.2d 616, 622 (5th Cir.1976) (holding that proof of prior inconsistent statement may be elicited by extrinsic evidence only if witness on cross examination denies making it). At trial, Ms. Beder admitted having made the statements in the article and explained that they were consistent with her testimony. Accordingly, the district court did not abuse its discretion in excluding the article.

5. *Florida's "Economic Loss Rule" Does not Bar BankAtlantic's Tort Claims*

[15] PaineWebber maintains that BankAtlantic's entire appeal is moot because every claim BankAtlantic pursued at trial was barred under Florida law, which holds that a party to a contract cannot raise tort claims to recover solely economic damages flowing from a breach of contract unless the tort is independent of the breach of contract. *See AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So.2d 180 (Fla.1987). This court adopted the *AFM* doctrine in *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769, 773 (11th Cir.1991),[9] making clear that there is no bar to tort claims for injury or loss "outside the scope of the contract between the parties." *Id.* at 775.

[16] BankAtlantic's position is that the two interest rate swaps were not encompassed in the contract that it entered into with PaineWebber. Until now, PaineWebber has argued that the interest rate swaps were outside of the contract. For example, in its memorandum in opposition to BankAtlantic's motion for j.n.o.v. or a new trial, PaineWebber stated the following:

> The evidence amply demonstrated that the swaps were agreed to, or entered into, independent of any alleged financial advisor agreement . . . [The evidence at trial established that the [financial advisor] agreement did not cover interest rate swaps . . . .

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[9] In *Interstate Securities*, a securities brokerage firm brought an action against its client and the client's guarantor to recover an amount owed following the liquidation of the account. In turn, the client and guarantor asserted a counterclaim for breach of fiduciary duty, among other claims, against the firm. Relying on *AFM*, the Court of Appeals held that the client and guarantor could not recover tort damages under Florida law for breach of fiduciary duty since that claim was dependent upon existence of contract. 920 F.2d at 776-77.

> Thus, even had the jury concluded that the swaps were entered into while the financial advisor agreement was effective, the evidence established that the agreement did not encompass the swaps.

PaineWebber cannot have it both ways. Because the interest rate swaps were outside the scope of the contract, *Interstate Securities* does not bar BankAtlantic's tort claims.

6. *The District Court Did Not Err in Granting Judgment on the Pleadings as to PaineWebber's Counterclaim*

PaineWebber contends that the district court erred in dismissing its counterclaim for attorney's fees pursuant to its indemnification agreement with BankAtlantic because the court misinterpreted the indemnity provision to apply only to third party claims.

[17, 18] Contract interpretation is a legal question subject to de novo review by this Court. *Gibbs v. Air Canada*, 810 F.2d 1529, 1532 (11th Cir.1987). Construction of an indemnity agreement generally is a question of law for the court applying generalized principles of contract construction. *Id.* at 1533. Accordingly, our task is to determine the parties' intent with regard to the scope of the indemnity agreement. *Id.* "In determining this intent, contract provisions should be given their natural and most commonly understood meaning in light of the subject matter and circumstances, and the language should be read in common with the other provisions of the contract." *Id.* (citations omitted).

[19] Citing this latter principle, PaineWebber claims that the pertinent language is contained in "three successive sentences" which should be read together. According to PaineWebber, the unambiguous language of the agreement provides that (1) BankAtlantic would

indemnify it for "any and all losses, claims, damages and liabilities"; (2) BankAtlantic agreed to "reimburse [PaineWebber] for any reasonable expenses incurred (including reasonable fees and disbursements of counsel) in connection with the defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with [PaineWebber's] acting pursuant to [this agreement]"; and (3) the only circumstance in which BankAtlantic was not required to indemnify PaineWebber was for "losses, claims, damages or liabilities . . . which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from the wilful misconduct or gross negligence on the part of [PaineWebber]." Agreement at 2. PaineWebber argues that the district court's construction of the indemnity provision as applying only to third party claims renders the "any and all" language meaningless and effectively rewrites the agreement. We disagree.

Based on our application of the above principles of contract construction, we find that the district court correctly interpreted the indemnity agreement as applying solely to third parties. Like PaineWebber, we apply the principle set forth in *Gibbs*, that "language should be read in common with the other provisions in the contract"; however, we reach a different result. In addition to the "three successive sentences" on which PaineWebber focuses, the indemnity agreement contains additional language which supports the district court's finding that agreement was not intended to release PaineWebber from claims by BankAtlantic, but rather to indemnify it against third party claims. The opening sentence states the following: "Since [PaineWebber] will be acting on behalf of [BankAtlantic], [BankAtlantic] agrees that it will hold harmless [PaineWebber], its officers, directors,

agents and affiliates. . . ." Agreement at 1. The agreement further provides as follows:

> Promptly after receipt [by PaineWebber] of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to [PaineWebber's] activities pursuant to the Engagement Letter, [PaineWebber] will notify [BankAtlantic] in writing of such complaint or the commencement of such action or proceeding or the actual receipt of written notice of any claim and if [BankAtlantic] so elects or is requested by [PaineWebber], [BankAtlantic] will assume the defense of such action. . . .

Agreement at 2.

The requirement of notice to BankAtlantic upon PaineWebber's receipt of a complaint or notice of any claim in connection with PaineWebber's activities clearly contemplates third party claims, not claims by BankAtlantic against PaineWebber. As the district court correctly noted, the plain language of the agreement indicates that the parties intended to indemnify PaineWebber solely against third party claims resulting from PaineWebber's agency relationship with BankAtlantic.

While we agree with the district court's interpretation of the indemnification agreement, ultimately PaineWebber's assertion of its right to expenses pursuant to that agreement must be rejected on other grounds. As discussed above, and as PaineWebber has contended throughout this litigation, the interest rate swaps were not within the scope of the financial advisor agreement. The indemnification agreement clearly states that the indemnification is for actions arising out of the financial

advisor agreement. Agreement at 2. Because the interest rate swaps were outside the scope of the underlying agreement, they are similarly outside the scope of the indemnification agreement. Consequently, the district court did not err in dismissing PaineWebber's counterclaim, even though it did so on other grounds.

7. *PaineWebber's Motion for Sanctions and Attorney's Fees*

[20] On October 11, 1990, almost a year after the Final Judgment on the jury verdict was entered, PaineWebber filed a motion for sanctions pursuant to Federal Rule of Civil Procedure 11[10] and Florida Statutes § 57.105.[11] The motion alleged that BankAtlantic and its counsel initiated the underlying action with the knowl-

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[10] Rule 11 provides in relevant part as follows:

> The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Fed.R.Civ.P. 11.

[11] In pertinent part, Section 57.105, Florida Statutes, provides as follows:

> The Court shall award reasonable attorney's fees to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney in any civil action in which the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the complaint or defense of the losing party; provided, however, the losing party's attorney is not personally responsible if he has acted in good faith, based on the representations of his client.

Attorney's fees pursuant to Florida Statute § 57.105 may be awarded to the prevailing party in a suit brought in federal court. *Capital Factors, Inc. v. Heller Fin., Inc.*, 712 F.Supp. 908, 914 (S.D.Fla.1989).

edge that BankAtlantic had suffered no injury, loss or damages and that its claims were not well grounded in fact or warranted by existing law. The district court denied the motion in an order entered October 26, 1990.

PaineWebber argues that the court abused its discretion in denying the motion and that the order "is fatally defective because it lacks an adequate evaluation as to the reason for denying the Rule 11 sanctions."[12] Brief at 14. In response, BankAtlantic contends that the district court adequately explained its decision and that PaineWebber's motion was untimely.

The standard for reviewing the October 26, 1990 order is abuse of discretion. *Pelletier v. Zweifel,* 921 F.2d 1465, 1514 (11th Cir.1991). The requirement of an explanation for the decision is mandated when "the basis and justification for a Rule 11 decision is not readily discernible on the record . . . . " *Knight v. Sharif,* 875 F.2d 516, 519 (5th Cir.1989) (quoting *Thomas v. Capital Security Servs.,* 836 F.2d 866 (5th Cir.1988)).

PaineWebber has not argued specifically that the district court's order violated section 57.105. However, the language of section 57.105 appears to be more stringent than that of rule 11 in requiring "that there was a complete absence of a justiciable issue of law or fact raised by the complaint . . . of the losing party." Accordingly, rejection of a rule 11 sanction clearly subsumes a denial of a statutory award of attorney's fees to the prevailing party.

[12] The court stated that it was "intimately" familiar with the proceedings. In denying the motion for Rule 11 sanctions, the court further stated the following:

> We have carefully scrutinized the Motion for Sanctions Pursuant to Rule 11 and responses. As is normal, the work products from both parties is excellent. However, we believe the motion must be denied. The parties will recall that at the time the court denied the motion for directed verdict, it observed that the case presented a "classic jury question." We continue to abide by that position. Given that observation, we do not deem this case warrants Rule 11 sanctions.

Contrary to PaineWebber's assertion, the rationale for the district court's decision was readily discernible. At the time the motion was denied, the court had already considered and denied PaineWebber's motion for directed verdict at the close of BankAtlantic's case in chief and the renewal of such motion after the close of all the evidence. In addition to evidence adduced by both parties, the court had the benefit of all the post-trial memoranda in which the "no damage" argument was also raised. Implicit in the court's denial of the Rule 11 motion was its determination at the close of all the evidence that there was sufficient evidence for a jury to consider. This determination was the antithesis of the basis for a Rule 11 sanction. Consequently, the district court did not abuse its discretion in denying PaineWebber's motion for rule 11 sanctions. In light of the court's proper disposition of the motion, we decline to reach the timeliness issue.

CONCLUSION

As the learned trial judge so aptly states in his Omnibus Order of January 19, 1990, "this cause presented the classic dispute for trial by jury." There was substantial evidence from which the jury reasonably found for PaineWebber. BankAtlantic received a full and fair trial on the merits. We find no error in the trial court's evidentiary rulings. The Final Judgment on the jury verdict and the Judgment on the Counterclaim were properly entered. The district court did not abuse its "large discretion" in denying the motions for new trial based on jury misconduct nor did it abuse its discretion in denying the motion for sanctions. For these reasons, the rulings and judgments appealed from are

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, A Federal Savings Bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INCORPORATED, n/k/a PAINEWEBBER, INCORPORATED,

Defendant.

ORDER

The Court is "intimately" familiar with these proceedings. We have carefully scrutinized the Motion for Sanctions Pursuant to Rule 11 and responses. As is normal, the work products from both parties is excellent. However, we believe the motion must be denied. The parties will recall that at the time the Court denied the Motion for Directed Verdict, it observed that the case presented a "classic jury question". We continue to abide by that position. Given that observation, we do not deem this case warrants Rule 11 sanctions. Accordingly the motion is denied.

DONE and ORDERED in Chambers, at Miami, Florida, this 26th day of October, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene E. Stearns, Esquire
John H. Schulte, Esquire
William C. Hearon, Esquire

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, etc.,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., etc.,

Defendant.

FINAL JUDGMENT

Based on this Court's Order of October 10, 1989, it is hereby ORDERED that final judgment shall be entered in favor of Plaintiff BankAtlantic and against Defendant on Defendant's counterclaim. The Court retains jurisdiction to assess costs and fees, to enforce the July 10, 1989 Order and to enter all other appropriate orders.

DONE and ORDERED in Chambers, at Miami, Florida this 26th day of January, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene Stearns, Esq.
John Schulte, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., n/k/a
PAINEWEBBER, INC.,

Defendant.

OMNIBUS ORDER

This cause is before the Court for resolution of post-trial motions and enforcement of the July 10, 1989 Order. Upon consideration of the arguments of counsel, we now enter the following order.

1. POST-TRIAL MOTIONS

A. Motion for JNOV or New Trial

Plaintiff has filed a Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial. The Court has reviewed Plaintiff's eighty-five (85) page memorandum of law with exhibits, asserting a myriad of errors. We have also considered Defendant's response and the full record of trial and pretrial proceedings.

Plaintiff urges the Court to scrutinize the verdict as the suspect resolution of a complex case. From that

perspective, Plaintiff argues that the verdict is not supported by the greater weight of the evidence. We disagree on both points. While some of the evidence was complex, the ultimate issues were not. Indeed, this cause presented the classic dispute for trial by jury. The parties introduced substantial evidence from which the jury reasonably found for Defendant. It is not for the Court to second-guess the jury's resolution of factual issues.[1]

As further grounds for relief, Plaintiff challenges certain evidentiary rulings by the Court. During the trial, in the exercise of our discretion, we afforded both parties great latitude in submitting evidence for consideration by the jury. These evidentiary issues were, for the most part, fully briefed and argued at the time of trial. Thus, we have already responded to Plaintiff's arguments, explaining our rulings in great detail, in open court and by written order. *See, e.g.*, Order of October 27, 1989 (evidence of financial interest); Trial Transcript filed November 14, 1989. Plaintiff received a full and fair trial on the merits. Even in retrospect, with the benefit of hindsight, we perceive no error.[2]

Finally, Plaintiff complains that the Court should have instructed the jury about Defendant's discovery misconduct and permitted Plaintiff to introduce evidence on this issue. The Court is somewhat surprised by Plaintiff's position. At trial, the Court decided that it would not be necessary to instruct the jury about Defendant's discovery abuses because the prejudice to Plaintiff had been "amply cured" through the expedited discovery we ordered on July 10, 1989. In any event, it was certainly

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[1] For the same reasons, any question of perjury was for the jury to resolve in determining the credibility of the witnesses.

[2] Similarly, we stand by our original rulings concerning the jury instructions.

within our discretion to determine that the panoply of sanctions otherwise imposed would suffice to achieve the desired result. *See* Order of October 20, 1989.

Finding no merit to these or Plaintiff's remaining assertions of error,[3] the Motion for Judgment Notwithstanding the Verdict, or Alternatively, for New Trial, is hereby DENIED.

B. Defendant's Motion for Reconsideration

Defendant's Motion for Reconsideration of Judgment on the Pleadings on Counterclaim and for Reinstatement of Counterclaim, is hereby DENIED. *See* Order of October 10, 1989.

II. SANCTIONS

This cause is now in the appropriate juxtaposition for enforcement of the July 10, 1989 order. Defendant's victory on the merits of this action does not affect our intent to enforce the July 10 order. The Court considered the possibility of Plaintiff's defeat at trial. *See* Memorandum Order, July 10, 1989, at page 31, para. 9 ("*Should* Plaintiff ultimately prevail on the merits of this action ....") (emphasis added). While we applaud the professional conduct of trial counsel, the discovery abuses of prior counsel and Defendant cannot be excused. Enforcement of the sanctions order is necessary to serve the punishment and deterrence goals of the rule and to vindicate the integrity of the Court and discovery process.

The Court has reviewed counsel's supplementary memoranda discussing the impact, if any, of *Pavelic and LeFlore v. Marvel Entertainment Group,* 110 S. Ct. 456

[3] In particular, we disagree with Plaintiff's characterization of Defendant's closing argument and therefore reject this argument as grounds for post-trial relief.

(1989), on the July 10 order. *Pavelic* was grounded in a strict construction of Rule 11. The July 10 order was based on Rule 37(b)(2) and the inherent sanctions power of federal courts, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Rule 37 is more comprehensive than Rule 11, and the inherent sanctions power is necessarily broad. Accordingly, *Pavelic* does not alter our decision.

Defendant argues that the inherent sanctions power of federal courts does not apply in diversity cases. That argument is contrary to Supreme Court and Eleventh Circuit authority, however. In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632 (1962), the Supreme Court upheld an order of dismissal for failure to prosecute, on the basis of the "well-acknowledged inherent power of a court to levy sanctions in response to abusive litigation practices." *Link* was a diversity case. Nearly twenty years later, in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-65 (1980), the Supreme Court cited *Link* as support in holding that federal courts possess inherent sanctions power.

Similarly, in *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440 (11th Cir. 1985), a diversity action, the district court imposed sanctions pursuant to Rule 37, 28 U.S.C. § 1927, and its inherent sanctions power. The Eleventh Circuit affirmed, finding that "*all* of these bases, relied upon by the court below, support its assertion of power to impose sanctions for bad faith conduct during discovery." *Id.* at 1447.

To the extent that *Carlucci* conflicts with *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1508 (11th Cir. 1985), *Carlucci* is the better rule. The inherent powers of federal courts are not derived from state law and therefore should not vary with the law of the forum state.

Accordingly, finding no reason to depart from the July 10, 1989 Order, it is hereby ORDERED as follows:

1. Ruden, Barnett's Motion to Amend Final Judgment is DENIED.

2. This cause is REFERRED to United States Magistrate Ted Bandstra for the issuance of a Report and Recommendation on the amount of costs and fees awardable to Plaintiff from Ruden, Barnett et al. and Defendant as a result of the July 10, 1989 Order.

3. Defendant's Motion to Tax Costs is DEFERRED pending review of the pleadings and documentation submitted. Ultimately, the Court will set-off the amount of costs due Defendant from the amount of costs and fees due Plaintiff as a result of the July 10, 1989 Order.

DONE and ORDERED in Chambers, at Miami, Florida this 19th day of January, 1990.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies mailed to:

Eugene Stearns, Esq.
John Schulte, Esq.
Bennett Falk, Esq.
Magistrate Bandstra

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC., n/k/a PAINEWEBBER, INC.,

Defendant.

SPECIAL VERDICT

I. CLAIMS

1. BREACH OF FIDUCIARY DUTY

Did PaineWebber breach a fiduciary duty or duties owed to BankAtlantic which thereby caused BankAtlantic's loss or damage?

(a) As to the first swap?

YES ____ NO ✔

(b) As to the second swap?

YES ____ NO ✔

Please go on to question 2.

2. FRAUDULENT MISREPRESENTATION

Did PaineWebber make a misrepresentation of material existing fact, which PaineWebber knew to be false, which it intended to induce BankAtlantic to rely upon, which BankAtlantic justifiably relied and acted upon, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ___ NO ✔

(b) As to the second swap?

YES ___ NO ✔

Please go on to question 3.

3. NEGLIGENT MISREPRESENTATION

Did PaineWebber make a misrepresentation of a material existing fact, which it should have known to be false, or which it made without knowledge of its truth or falsity, which it intended to induce BankAtlantic to rely upon, and which BankAtlantic justifiably relied and acted upon, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ___ NO ✔

(b) As to the second swap?

YES ___ NO ✔

Please go on to question 4.

4. FRAUDULENT CONCEALMENT

Did PaineWebber intentionally conceal from BankAtlantic a material fact, which PaineWebber knew or should have known to be material, which was unknown to BankAtlantic, and which if known to BankAtlantic would have kept BankAtlantic from entering into the

interest rate swaps, and which thereby caused BankAtlantic damage?

(a) As to the first swap?

YES ____ NO ✔

(b) As to the second swap?

YES ____ NO ✔

Please go on to question 5.

5. NEGLIGENCE

(a) Did PaineWebber fail to use reasonable care with regard to the interest rate swaps entered into by BankAtlantic, which was a legal cause of BankAtlantic's loss or damage?

(i) As to the first swap?

YES ____ NO ✔

(ii) As to the second swap?

YES ____ NO ✔

If you answered "yes" as to one or both swaps in question 5(a), please answer question 5(b). If you answered "no" as to both swaps in question 5(a), please proceed to Section II, Affirmative Defenses.

(b) Did BankAtlantic fail to use reasonable care with regard to the interest rate swaps which thereby caused BankAtlantic's loss or damage?

(i) As to the first swap?

YES ____ NO ____

(ii) As to the second swap?

YES ____ NO ____

If you answered "yes" as to one or both swaps in question 5(b), please answer question 5(c). Otherwise, proceed to Section II, Affirmative Defenses.

(c) What percentage of the total negligence is chargeable to each party?

(i) As to the first swap? (Only answer this question if you answered "yes" to question 5(b)(i)).

PaineWebber ____% BankAtlantic ____%

(NOTE: the total combined percentage must equal 100%)

(ii) As to the second swap? (Only answer this question if you answered "yes" to question 5(b)(ii)).

PaineWebber ____% BankAtlantic ____%

(NOTE: the total combined percentage must equal 100%)

Please go on to Section II, Affirmative Defenses.

II. AFFIRMATIVE DEFENSES

If you have answered "yes" as to one or both swaps in questions 1, 2, 3, 4 or 5(a), please answer questions 6 and 7. Otherwise, the foreperson should now sign and date the verdict form.

(6) RATIFICATION

Did BankAtlantic ratify PaineWebber's conduct as to:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to question 7.

(7) WAIVER

Did BankAtlantic knowingly relinquish, or waive, its right to hold PaineWebber responsible for any loss in connection with:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to Section III, Damages.

III. DAMAGES

If you have answered "yes" as to one or both swaps in questions 1, 2, 3, 4 or 5(a), *and* you have further answered "no" to questions 6 and 7, go on to question 8. Otherwise, the foreperson should now sign and date the verdict form.

(8) MITIGATION OF DAMAGES

Did BankAtlantic fail to mitigate its damages with respect to:

(i) the first swap? YES ____ NO ____

(ii) the second swap? YES ____ NO ____

Please go on to question 9.

(9) COMPENSATORY DAMAGES

What amount of money will fairly and adequately compensate BankAtlantic for the loss or damage that it has suffered? (If you have answered "yes" as to one or both swaps in question 8, you should reduce the amount of compensatory damages by the amount that BankAtlantic

could have reasonably realized had it mitigated its damages):

(i) As to the first swap? $_____

(ii) As to the second swap? $_____

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of BankAtlantic. If you have found BankAtlantic negligent in any degree, the Court, if necessary, will reduce the total amount of damages by the amount you found chargeable to BankAtlantic.

If you have awarded any money to BankAtlantic under question 9, go on to question 10. If you have awarded no money to BankAtlantic under question 9, the foreperson should now sign and date the verdict form.

(10) PUNITIVE DAMAGES

(a) Do you find, in your discretion, that punitive damages should be awarded against PaineWebber?

YES ___ NO ✔

If you have answered "yes," to question 10(a), go on to question 10(b). If you have answered "no" to question 10(b), the foreperson should now sign and date the verdict form.

(b) How much do you assess as punitive damages against PaineWebber? $ 0

SO SAY WE ALL, this 14th day of November, 1989.

_____

FOREPERSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,

Defendant.

MEMORANDUM DECISION

This cause is before the Court upon Defendant PaineWebber, Inc.'s Motion for Directed Verdict. The Court has considered Defendant's written submission and the arguments of both counsel in open court. We are now prepared to rule on the motion.

On a motion for directed verdict, the Court must consider all of the evidence in the light most favorable to the non-moving party. The motion should be granted only if no reasonable jury could find for the non-movant. *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717 (11th Cir. 1986).

Many of the arguments raised by Defendant at this stage would require the Court to resolve conflicts in the evidence, and for that reason should more properly be put to the jury. For example, the question of whether Plaintiff has proven an independent tort raises numerous fact issues as to each element of the torts alleged. Plaintiff has introduced sufficient evidence from which the jury could

find an independent tort. Under these circumstances, the Court has no power or inclination to take this case from the jury on this point.[1]

Defendant further alleges that Plaintiff has failed to prove its case on the breach of fiduciary relationship claim, because the transactions at issue were allegedly consummated outside the temporal scope of the engagement letter. This argument, however, misapprehends the nature of fiduciary duty law. A fiduciary relationship is not necessarily bounded by a contract. On the contrary, "a fiduciary relationship may exist under a variety of circumstances, including cases where there has been a special confidence reposed in one, who in equity and good conscience is bound to act in good faith and due regard to the interests of the one reposing the confidence." *Riggs National Bank v. Freeman,* 682 F. Supp. 519, 520 (S.D. Fla. 1988) (Hoeveler, J.). Given this broad definition, and in light of the evidence presented, a directed verdict would be improper on this basis.

Finally, the Court has given special consideration to Plaintiff's argument on loss causation which, in our view, is Plaintiff's strongest argument. We have reviewed the relevant case law in an effort to resolve this issue. Most of the cases speak in terms of abstract principles without grounding them in the facts. However, in the final analysis, the Court is persuaded by the most recent pronouncement of the Eleventh Circuit, as cited by Plaintiff in opposition to the motion. In *Bruschi v. Brown,* 876 F.2d 1526, 1531 (11th Cir. 1989), the court found that the loss causation element was met in a "situation in which a defendant induces a plaintiff to enter into a risky transac-

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[1] For the same reason, the Court will not direct a verdict on the grounds of failure to mitigate or prove damages. Sufficient evidence exists for a jury determination on these questions.

tion by misrepresenting it as safe and the plaintiff suffers a loss resulting from the risky nature of the investment."

The Court finds that *Bruschi* is controlling here. Plaintiff has offered evidence of several misrepresentations sufficient to raise a jury question on loss causation. In particular, we note that a reasonable jury could find that the alleged misrepresentations as to the beneficial effects of interest rate swaps on interest rate risk "touches upon" the losses incurred by Plaintiff due to falling interest rates. *Huddleston v. Herman & McLean*, 640 F.2d 534, 539 (5th Cir. Mar. 1981). Finding that the nexus of loss causation has been sufficiently established, the motion must be denied on that basis as well.

Accordingly, for all of these reasons, the Motion for Directed Verdict is hereby DENIED and Defendant shall attempt to rebut Plaintiff's case by way of evidence and closing argument to the jury.[2] As Plaintiff has abandoned its breach of contract claim, that count is hereby DISMISSED with prejudice.

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[2] In view of this ruling, punitive damages have become relevant as to the independent torts involving intentional wrongdoing. Accordingly, Defendant shall forthwith produce evidence of financial worth to Plaintiff, consistent with our prior orders. The Court will instruct the jury on punitive damages, and the parties may argue the issue accordingly.

DONE and ORDERED in Chambers at Miami, Florida on this 31st day of October, 1989.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies to:

Eugene Stearns, Esq,
John Schulte, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, f/k/a
ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

v.

BLYTH EASTMAN PAINE WEBBER, INC.,
n/k/a PAINEWEBBER, INC.,

Defendant.

OMNIBUS ORDER

This cause is before the Court on various pending motions of both parties. Upon consideration, it is hereby ORDERED as follows:

1. Based upon an independent review of the file and relevant documents, the Report and Recommendation of the Special Master is hereby APPROVED and ADOPTED as an Order of the Court, and all objections are OVERRULED. By way of clarification, it is hereby ORDERED that should Plaintiff introduce sufficient evidence to submit the question of punitive damages to the jury, Defendant shall be prepared to provide Plaintiff with documents evidencing Defendant's financial worth. The terms of the Report and Recommendation are further clarified and supplemented by the terms of this Order.

2. Plaintiff's Motion in Limine to prevent introduction of evidence of Alan Levan's corporate or

financial interest in BankAtlantic is DENIED at this time. The evidence is relevant for impeachment purposes. Plaintiff may renew the objection at trial if the evidence is not offered to impeach and is not otherwise relevant as offered.

3. Defendant's Motion for Continuance is DENIED. Defendant has failed to provide sufficient cause for any further delay of trial.

4. Plaintiff filed a Motion for Judgment on the Pleadings as to Defendant's Counterclaim and 11th and 12th Affirmative Defenses two business days before trial. Because the motion was not at issue, initially the Court was inclined to deny Plaintiff's motion without prejudice to renew as a motion for directed verdict at the appropriate time. However, one calendar day before trial, Defendant has responded to the motion by way of a motion for judgment on the pleadings on the counterclaim, and for summary judgment on Counts V (negligent misrepresentation) and VI (negligence) of the Amended Complaint.

The Court has reviewed the arguments of counsel and finds no reason for further delay on the question of law presented. "Under Florida law, construction of a contract of indemnity generally is a question of law for the court applying recognized rules of contract interpretation." *Gibbs v. Air Canada*, 810 F.2d 1529, 1533 (11th Cir. 1987). The Court's role is to determine the intent of the parties by giving the terms of the agreement "their natural and most commonly understood meaning in light of the subject matter and circumstances." *Id.*

The ordinary purpose of an indemnification agreement between two parties is to shift liability for

claims asserted by third parties. Defendant contends, however, that Plaintiff has agreed to indemnify Defendant against claims held by Plaintiff against Defendant. In essence, then, Defendant has read the indemnification agreement as a *release* of claims that Plaintiff might otherwise assert against Defendant.

The indemnity provision does not support Defendant's position because the provision does not speak in terms of a release of liability. The lead sentence of the indemnity provision states, "Since BEPW will be acting on behalf of the Association [BankAtlantic], the Association agrees that it will indemnify and hold harmless BEPW . . . ." Similarly, the indemnity provision requires Defendant to give notice to Plaintiff of receipt of claims covered by the agreement. Plainly, the parties intended to shift liability from Defendant to Plaintiff for certain third party claims resulting from Defendant's agency relationship with Plaintiff.

Accordingly, Plaintiff's Motion for Judgment on the Pleadings as to Defendant's Counterclaim and 11th and 12th Affirmative Defenses is hereby GRANTED, and Defendant's Motion for Judgment on the Pleadings on its Counterclaim, and for Summary Judgment on Counts V and VI of the Amended Complaint is hereby DENIED. Accordingly, CounterPlaintiff PaineWebber, Inc.'s Motion to Defer Attorneys' Fees Until After Trial is DENIED as moot, in light of our ruling in paragraph three of this Order.

5. Plaintiff's Renewed Motion to Strike Defendant's Pleadings, or Alternatively, to Amend the Court's Memorandum Order of July 10, 1989, is DENIED, in view of the facts provided in Defen-

dant's response. The time has come for Plaintiff and Defendant to put their claims to the test of the factfinder.

6. The Joint Motion for In Camera Review is GRANTED. The Court will conduct a hearing on the motion on Wednesday, October 11, 1989 at 9:30 a.m.

7. The Application for Limited Appearance by Rolling Chippey is GRANTED.

8. As the parties have been telephonically notified, Plaintiff's Motion for Extension of Time to File Amended Pretrial Stipulation and Defendant's Motion for Pretrial Conference are GRANTED to the following extent: (a) the parties shall file an amended pretrial stipulation by 5:00 p.m. on October 9, 1989 with a courtesy copy in Chambers; (b) the parties shall meet with a court reporter present and attempt to resolve all matters pertaining to pretrial conference without the aid of the Court. Any remaining matters should be submitted to the Court, with a transcript of proceedings, by 5:00 p.m. on October 9, 1989. The Court will review the transcript and resolve any outstanding matters on the morning of trial.

9. As the parties have been telephonically notified, counsel shall submit proposed voir dire questions by 5:00 p.m. on October 9, 1989. Counsel shall submit proposed jury instructions and interrogatory verdict forms on October 12, 1989.

10. Defendant's Motion to Stay Action Pending Arbitration is DENIED. This issue should have been raised at the pleading stage, not on the eve of trial. Accordingly, any right to arbitration has been waived. Moreover, arbitration would merely avoid the terms of the July 10, 1989 Order.

11. Defendant's Motion for Summary Judgment on Counts I-VI is DENIED. Plaintiff need not rely solely on contractual remedies as Plaintiff has adequately alleged an independent tort. *See AFM Corporation v. Southern Bell Telephone and Telegraph Co.*, 515 So. 2d 180 (Fla. 1987); *Lewis v. Guthartz*, 428 So. 2d 222 (Fla. 1982); *American International Land Corp. v. Hanna*, 323 So. 2d 567 (Fla. 1975); *John Brown Automation, Inc. v. Nobles*, 537 So. 2d 614 (Fla. 2d DCA 1988); *Hooper v. Barnett Bank of West Florida*, 474 So. 2d 1253 (Fla. 1st DCA 1985).

12. Defendant's Motion in Limine to Exclude Evidence of Discovery Disputes is GRANTED. Counsel shall not make any reference to discovery matters at trial and shall not attempt to introduce any evidence of discovery disputes. However, the Court DEFERS the issue of instructing the jury pursuant to paragraph eleven of the Memorandum Order of July 10, 1989.

13. Defendant's Motion in Limine to Exclude Evidence Varying the Terms of the Engagement Letter is DENIED.

14. Plaintiff's Motion to Strike Witnesses and Exhibits is DENIED. Plaintiff has been permitted further discovery pursuant to the Memorandum Order of July 10, 1989 and therefore has suffered no cognizable prejudice on this motion.

15. Defendant's Motion in Limine Regarding the Measure of Damages is DEFERRED until the appropriate moment at trial.

DONE and ORDERED in Chambers at Miami, Florida on this 10th day of October, 1989.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

Copies to:

Eugene Stearns, Esq.
John Schulte, Esq.
Michael Nachwalter, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, a federal savings bank, f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

vs.

BLYTHE EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINEWEBBER INCORPORATED,

Defendant.

AMENDED AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Blythe Eastman Paine Webber Inc., n/k/a PaineWebber, Inc. ("PaineWebber"), by and through its undersigned counsel, submits the following amended affirmative defenses to plaintiff BankAtlantic's amended complaint.

FIRST AFFIRMATIVE DEFENSE

84. Each count asserted by plaintiff fails to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

85. Plaintiff, at the time of the transactions complained of, was sophisticated with respect to interest rate

risks and their management. Plaintiff considered, or should have considered, alternative financial vehicles to manage its interest rate spreads, including collateral mortgage obligation (CMO) financing, asset sales, equity reappraisals, and regulatory accounting. Before and during the interest rate swaps complained of, plaintiff was in communication with brokerage firms, investment banks, and other institutions which presented various products and alternatives for plaintiff's consideration to manage interest rate risks. Plaintiff thus had full, complete, and contemporaneous knowledge of the terms of, and risks inherent in, the interest rate swaps and other transactions complained of, and approved, authorized, and ratified the transactions complained of, and is accordingly precluded from recovery.

THIRD AFFIRMATIVE DEFENSE

86. Plaintiff's recovery, if any, should be barred wholly or in part as a result of plaintiff's comparative negligence in connection with the transactions complained of.

FOURTH AFFIRMATIVE DEFENSE

87. Plaintiff's damages, if any, should be reduced as a result of plaintiff's failure to mitigate damages.

FIFTH AFFIRMATIVE DEFENSE

88. Plaintiff voluntarily assumed all risks attendant to the interest rate swaps and transactions complained of and therefore is precluded from recovery.

SIXTH AFFIRMATIVE DEFENSE

89. Plaintiff had full, complete, and contemporaneous knowledge of the terms of, and risks inherent in, the interest rate swaps and other transactions complained of, and nonetheless approved and authorized the transactions, and continued to act under the agreements allegedly entered into. Plaintiff is therefore barred from asserting its claim under the doctrine of waiver and estoppel.

SEVENTH AFFIRMATIVE DEFENSE

90. Plaintiff's alleged damages are not recoverable on the grounds that they were not within the contemplation of the parties, nor were they foreseeable.

EIGHTH AFFIRMATIVE DEFENSE

91. Assuming that the alleged misstatements or omissions alleged in the amended complaint were made, which is denied, such statements or omissions related to matters of opinion and expectations of future occurrences and are therefore not actionable.

NINTH AFFIRMATIVE DEFENSE

92. Assuming that plaintiff suffered any damages, which is denied, such damages were caused or contributed to by persons, market conditions, or events beyond the control of defendant, and defendant is not liable therefor.

TENTH AFFIRMATIVE DEFENSE

93. Plaintiff lacks standing to maintain this action.

ELEVENTH AFFIRMATIVE DEFENSE

94. Plaintiff is contractually precluded from recovering any damages from defendant in this action by virtue of the parties' March 20, 1984 indemnity and damage limitation agreement, which is attached as Exhibit "A" and is incorporated by reference herein. This agreement either bars any recovery by plaintiff, or alternatively, establishes plaintiff's indemnity and reimbursement obligation to defendant, which obligation constitutes a complete set-off to any recovery by plaintiff.

TWELFTH AFFIRMATIVE DEFENSE

95. Plaintiff's recovery, if any, is contractually limited to the amount of fees actually received by defendant pursuant to the engagement letter, unless defendant is liable for gross negligence or intentional misconduct. A copy of the indemnity and damage limitation agreement is attached as Exhibit "A" and is incorporated by reference herein.

WHEREFORE, defendant PaineWebber demands judgment in its favor, and such other and further relief as the Court deems just and equitable, including costs and attorneys' fees.

TEW JORDEN SCHULTE & BEASLEY
Counsel for PaineWebber Incorporated
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

By _____
John H. Schulte

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing amended answer and affirmative defenses to amended complaint was hand-delivered this 1st day of September, 1989, upon Eugene Stearns, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., 2200 Museum Tower, 150 West Flagler Street, Miami, Florida 33130.

John H. Schulte

EXHIBIT "A"

Atlantic Federal Savings and Loan
Association of Fort Myers
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

March 20, 1984

Blyth Eastman Paine Webber Incorporated
1221 Avenue of the Americas
New York, New York 10020

Dear Sirs:

This letter will confirm certain arrangements that we have agreed upon in connection with Atlantic Federal Savings and Loan Association of Fort Lauderdale (the "Association") retaining Blyth Eastman Paine Webber Incorporated ("BEPW") to represent the Association exclusively as financial advisor pursuant to the engagement letter dated today's date between BEPW and the Association (the "Engagement Letter").

In connection with BEPW's services, the Association will furnish or cause to be furnished to BEPW such information and data (hereinafter referred to as the "Information") relating to the Association as BEPW reasonably requests. The Association also will use its best efforts to provide BEPW with reasonable access to the Association's officers, directors, employees and independent accountants. BEPW agrees that the Information, whether oral or written, will be kept confidential by BEPW and by its officers, employees and agents, will be disclosed by BEPW only to such officers, employees and agents of BEPW and its affiliates as need to know the Information in connection with the performance of BEPW's services under the Engagement Letter, and will be used only for purposes of such engagement; and

BEPW agrees that the provisions of this sentence shall survive any termination of BEPW's engagement under the Engagement Letter. The Association recognizes and confirms that in BEPW's performance of its services under the Engagement Letter (a) BEPW may rely upon the Information without independent verification, (b) BEPW does not assume responsibility for the accuracy or completeness thereof whether or not it makes an independent verification, and (c) BEPW will not make nor cause to have made an independent appraisal of the assets of the Association except to the extent provided in the Engagement Letter.

Since BEPW will be acting on behalf of the Association, the Association agrees that it will indemnify and hold harmless BEPW, its officers, directors, agents, employees and affiliates and each person, if any, who controls BEPW within the meaning of Section 15 of the Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934 (BEPW and each such entity and person being hereinafter called an "Indemnified Party") from and against any and all losses, claims, damages and liabilities to which such Indemnified Party may become subject which are (A) related to or arising out of (i) actions taken or omitted to be taken (including any untrue statements made or any statements omitted to be made) by the Association or (ii) actions taken or omitted to be taken by an Indemnified Party with the Association's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, the Association or (B) otherwise related to or arise out of BEPW's acting pursuant to the covenants contained in the section captioned "Financial Analysis of the Association" and "Advisory Issues/Stockholder Interests" in the Engagement Letter. The Association also agrees to reimburse each Indemnified Party for any reasonable expenses incurred (including reasonable fees and disbursements of counsel)

in connection with the investigation of or the preparation for or defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with BEPW's acting pursuant to the Engagement Letter, whether or not BEPW is named party thereto and whether or not any liability results therefrom. The Association will not, however, be responsible for any losses, claims, damages or liabilities (i) for which indemnification is sought solely pursuant to clause (B) of the first sentence of this paragraph which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from wilful misconduct or gross negligence on the part of the Indemnified Party seeking indemnification hereunder, or for expenses incurred by such Indemnified Party in connection with such losses, claims, damages or liabilities or (ii) arising out of any settlement by an Indemnified Party of any claim, action or proceeding entered into by or on behalf of such Indemnified Party without the Association's prior written consent.

Promptly after receipt by any Indemnified Party of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to BEPW's activities pursuant to the Engagement Letter, BEPW will notify the Association in writing of such complaint or of the commencement of such action or proceeding or the actual receipt of written notice of any claim and if the Association so elects or is requested by BEPW, the Association will assume the defense of such action, proceedings, or claim, including the employment of counsel reasonably satisfactory to BEPW and the payment of the fees and disbursements of such counsel, in which event the Association shall not be obligated to pay the fees and disbursements of separate counsel for BEPW in such action. In the event, however, that

BEPW's legal counsel shall reasonably determine that defenses may be available to an Indemnified Party that are different from or in addition to those available to the Association or that there is or could reasonably be expected to be a conflict of interest by reason of the Association and an Indemnified Party having common counsel in any action or proceeding, or if the Association has not assumed the defense of any action or proceeding, then BEPW may employ separate counsel to represent or defend it or any Indemnified Party in any such action or proceeding in which it or such Indemnified Party may become involved or is named as defendant and the Association shall pay the reasonable fees and disbursements of such separate counsel; *provided* that the Association shall not be obligated to pay the fees and disbursements of more than one such separate counsel for any one such action or proceeding in any one jurisdiction.

The Association and BEPW agree that if any indemnification or reimbursement sought by an Indemnified Party pursuant to this agreement is held by a court to be unavailable for any reason except, with respect to indemnification sought solely pursuant to clause (B) of the first sentence of the third paragraph hereof, for the reasons specified in the third sentence of such paragraph, then (whether or not BEPW is the Indemnified Person) the Association and BEPW shall contribute to the losses, claims, damages, liabilities and expenses for which such indemnification or reimbursement is held unavailable in such proportion as is appropriate to reflect the relative degree of fault and benefits of the Association on the one hand, and BEPW on the other hand, in connection with the transaction or transactions contemplated by the Engagement Letter, subject to the limitation that in any event BEPW's aggregate contribution to all losses, claims, damages, liabilities and expenses with respect to which contribution is available hereunder shall not exceed

the amount of fees actually received by BEPW pursuant to the Engagement Letter unless such contribution arises out of the gross negligence or wilful misconduct of BEPW or any of its officers, directors, employees and affiliates.

In the event of administrative proceedings or litigation in connection with the services provided under the Engagement Letter, BEPW agrees that its representatives will testify or otherwise assist the Association in preparing for testimony, at the request of the Association. The Association will pay BEPW reasonable and customary additional compensation as agreed upon by BEPW and the Association to cover testifying in connection with such litigation and the preparation for such litigation, proceeding or testimony and will reimburse BEPW for all out-of-pocket expenses reasonably incurred by BEPW in connection therewith, including the fees and disbursements of its legal counsel.

Sincerely,

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION OF
FORT LAUDERDALE

By: _____

Accepted as of the date
first indicated above:

BLYTH EASTMAN PAIN WEBBER
INCORPORATED

By: _____

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, a federal savings bank,
f/k/a ATLANTIC FEDERAL SAVINGS AND LOAN
ASSOCIATION OF FT. LAUDERDALE,

Plaintiff,

v.

BLYTHE EASTMAN PAINE WEBBER, INC.,
n/k/a PAINE WEBBER, INC.,

Defendant.

COUNTERCLAIM

Counterplaintiff PaineWebber, Inc. ("PaineWebber"), hereby sues counterdefendant, BankAtlantic, a federal savings bank, f/k/a Atlantic Federal Savings & Loan Association of Ft. Lauderdale ("BankAtlantic"), and alleges:

1. This is an action for damages in excess of $10,000.00 exclusive of interest and costs, and involves a controversy between citizens of different states. This Court has jurisdiction under 28 U.S.C. §1332.

2. This is a compulsory counterclaim which arises out of the same transaction or occurrence that is the subject matter of BankAtlantic's claim and does not require for its adjudication the presence of third parties of whom the Court cannot acquire jurisdiction.

3. PaineWebber is incorporated under the laws of the State of Delaware with its principal place of business in New York.

4. BankAtlantic is a federally chartered savings and loan association doing business in the State of Florida with its principal place of business in Ft. Lauderdale, Florida.

5. PaineWebber was retained by BankAtlantic pursuant to an "engagement letter," which was executed by representatives for each party and dated March 20, 1984. A copy of the engagement letter is attached hereto as Exhibit "A".

6. The engagement letter outlined the services to be performed by PaineWebber for BankAtlantic, and discussed PaineWebber's right to compensation and indemnification from BankAtlantic. The engagement letter specifically referred to the standard indemnification agreement required by PaineWebber from all of its clients for the types of services covered by this engagement. PaineWebber's standard indemnity and damage limitation agreement was referenced in and attached to the engagement letter.

7. PaineWebber's standard indemnity and damage limitation agreement was reviewed and modified by counsel for BankAtlantic; and thereafter executed by representatives for each party under date of March 20, 1984. A copy of the agreement is attached hereto as Exhibit "B."

8. PaineWebber performed each of the services required by the engagement letter attached as Exhibit "A."

9. Notwithstanding PaineWebber's performance of its contractual obligations, BankAtlantic terminated PaineWebber's engagement. Upon information and belief, BankAtlantic terminated PaineWebber's engagement in order to avoid paying PaineWebber a fee of $150,000.00

on June 30, 1985, which sum would be due if BankAtlantic continued to be "independent."

10. BankAtlantic specifically agreed in the engagement letter, attached as Exhibit "A," that BankAtlantic's indemnity and damage limitation agreement would survive the completion of PaineWebber's services or any termination of PaineWebber's engagement.

11. Pursuant to the indemnity and damage limitation agreement, BankAtlantic agreed to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber might become subject which are related to or arise out of PaineWebber's actions and inactions under the engagement letter and/or related to or arising out of actions taken or omitted to be taken by PaineWebber with BankAtlantic's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, BankAtlantic. BankAtlantic further agreed to reimburse PaineWebber for any reasonable expenses incurred, including reasonable attorney's fees and costs, in connection with the investigation of or preparation for or defense of any formal or informal claim, action or other proceeding caused by or arising out of or in connection with PaineWebber's actions or inactions pursuant to the engagement letter.

12. The indemnity and damage limitation agreement was intended to cover and apply to any direct action by BankAtlantic against PaineWebber, whether brought by BankAtlantic management at the time services were rendered, subsequent management or by minority shareholders through a derivative action. The indemnity and damage limitation agreement also was intended to apply to any third party claim against PaineWebber.

13. In 1987, BankAtlantic sued PaineWebber for PaineWebber's alleged action and inactions related to or arising out of PaineWebber's performance of its obligations under the engagement letter and/or other actions taken or omitted to be taken by PaineWebber with BankAtlantic's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, BankAtlantic. This event triggered BankAtlantic's obligation under the indemnity and damage limitation agreement, attached as Exhibit "B," to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber has become subject to as a result of BankAtlantic's lawsuit. The indemnity and damage limitation agreement was specifically intended to prevent precisely this type of lawsuit, by shifting the economic risk of any such action from PaineWebber to BankAtlantic, except in cases of willful misconduct or gross negligence. PaineWebber has committed no willful misconduct or gross negligence.

14. All conditions precedent to the filing of this action have occurred, have been performed or have been waived.

15. As a direct consequence of BankAtlantic filing suit against PaineWebber, PaineWebber has been required to retain counsel and incur attorney's fees and costs in defending against that action.

16. By entering into the written indemnity and damage limitation agreement, which is attached as Exhibit "B" and incorporated by reference herein, BankAtlantic obligated itself to indemnify and hold harmless PaineWebber from and against any and all losses, claims, damages and liabilities to which PaineWebber may become subject related to or arising out of its representation of BankAtlantic.

17. By filing a lawsuit against PaineWebber, BankAtlantic triggered its obligations under the indemnity and damage limitation agreement to indemnify and hold harmless PaineWebber.

18. BankAtlantic has breached the indemnity and damage limitation agreement by failing to indemnify and hold harmless PaineWebber as required by its agreement.

19. As a direct and proximate result of BankAtlantic's breach of the indemnity and damage limitation agreement, PaineWebber has suffered damages.

WHEREFORE, PaineWebber demands judgment against BankAtlantic for damages, interest, costs and such further and other relief as this Court deems proper.

TEW JORDEN SCHULTE & BEASLEY
Attorneys for CounterPlaintiff
PaineWebber, Inc.
701 Brickwell Avenue
Miami, Florida 33131
(305) 371-2600

By: _____
JOHN H. SCHULTE

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was hand-delivered to Eugene Stearns, Esq., Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A., Attorneys for Plaintiff, 2200 Museum Tower, 150 West Flagler Street, Miami, Florida 33130, this 1st day of September, 1989.

_____

Of Counsel

EXHIBIT "A"

BLYTH EASTMAN PAINE WEBBER
INCORPORATED
1221 Avenue of the Americas
New York, New York 10020
(212) 730-8500

March 20, 1984

Mr. Donald V. Streeter
President, Chairman of the Board,
and Chief Executive Officer
Atlantic Federal Savings and Loan
Association of Fort Lauderdale
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

Dear Don:

This Letter Agreement is to confirm that Blyth Eastman Paine Webber Incorporated ("BEPW") has been retained by Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal" or the "Association") as financial advisor. A summary of the services which we will provide under this engagement and the compensation therefor follows.

Financial Analysis of the Association

We will undertake an analysis of Atlantic Federal as follows:

1. The preparation of a study framework of the Association which will include:

a. A review and analysis of the Association's operating results;

b. A review and analysis of the Association's lending and investment activities;

c. A review and analysis of the Association's deposit-taking and borrowing activities;

d. A review and analysis of the Association's primary market area, including the competitive and economic environment, and the population, personal income, unemployment and housing characteristics thereof;

e. A review of comparable savings and loan associations;

f. A review of recent purchase and sale transactions of generally similar associations and financial institutions, as appropriate.

2. A review and analysis of the Association's financial performance, including profitability, growth, financial condition and components of income and expense.

The steps to be taken to perform the above-stated work will include, but not be limited to:

1. A review of the Association's last five years' audited financial statements.

2. A review of the Association's Annual Report to Stockholder's forms 10-K and 10-Q, semi-annual Federal Home Loan Bank reports and other reports filed with the Federal Home Loan Bank of Atlanta or the Federal Home Loan Bank Board.

3. Visits to Atlantic Federal's facilities, as appropriate.

4. Discussions with management concerning the Association's business and its outlook, including future operating plans, goals and objectives.

5. Such other reviews and analyses as we deem appropriate to aid in completing our valuation work.

Advisory Issues/Stockholder Interests

We will advise the Association, in coordination with Atlantic Federal and its legal counsel, in the determination of whether certain actions by third parties are in the best interests of the Association and its stockholders. If such actions are deemed not to be, we will assist the Association in coordination with its counsel in developing a strategy to deal with those actions. In connection with these issues, BEPW will review, among other things, the following:

1. The market for and trading history of the Association's shares.

2. The stockholder composition of Atlantic Federal, including analysis of CEDE accounts, with emphasis and attention to dissident interests.

3. Communication policy between the Association and the investment community in general.

4. Third party actions which Atlantic Federal might initiate which are determined to be in the best interest of the stockholders.

Compensation and Indemnification

Our engagement fee covering the services outlined in this letter is $100,000, $50,000, payable upon execution of this agreement and $50,000 payable September 30, 1984. In addition, Atlantic Federal will pay BEPW a quarterly retainer of $25,000 for assistance in developing strategies with regard to dissident interests and other issues relating to stockholder interests. Quarterly retainer payments will commence with the first quarter of calendar year 1985 and shall thereafter be due and payable as of the last business day of each calendar quarter thereafter (commencing March 29, 1985) unless the engagement of BEPW hereunder is terminated as hereafter provided. If

Atlantic Federal is independent on June 30, 1985, the Association will pay BEPW a fee of $150,000 for its general consulting and advisory services. For purposes of this letter, the term "independent" shall mean that (i) no person (as the term "person" is used in Section 13(d) or 14(d)(2) of the Securities Exchange Act of 1934, as amended) shall have acquired beneficial ownership of more than 50% of the issued and outstanding shares of common stock of the Association or shall have offered to purchase such number of shares of common stock which offer shall not have thereafter been withdrawn or preliminarily enjoined and (ii) individuals who as of the date thereof constituted a majority of the Board of Directors cease for any reason to constitute a majority thereof by or as of June 30, 1985 unless the election, or the nomination for election, by the Association's shareholders of each new Director of the Association was approved by a vote of a majority of the Directors of the Association who were Directors as of the date hereof.

In the event that BEPW is requested to render an opinion as to fairness or adequacy from a financial point of view of any unsolicited offer involving the Association, we will review with you the questions of an additional fee in an amount up to $100,000, depending upon the complexity and use of the opinion and other factors. In connection with a proxy contest or an unsolicited offer involving the Association or a related transaction, BEPW would receive such additional fees as we would mutually agree upon at the time of such event. In connection with any and all of the services described above, BEPW will be reimbursed for its reasonable out-of-pocket expenses, including reasonable fees and disbursements of BEPW counsel.

In addition, during the period of the engagement of BEPW hereunder Atlantic Federal will give BEPW a

right of first refusal to act as financial advisor with regard to any transaction not contemplated by this agreement at standard rates of compensation. In the event that financing requiring an intermediary is related to our activities under this engagement, Atlantic Federal agrees that BEPW will have the exclusive right to act as agent or managing underwriter in connection with such financing.

This engagement may be terminated by either party upon 30 days written notice to the other, provided however, that any remaining amount of the retainer will come due on the date of termination, except that (i) the Association shall have no obligation to pay any amount otherwise payable pursuant to the last sentence of the first paragraph of this Section captioned "Compensation and Indemnification" if this engagement is terminated by notice given within 75 calendar days of the date hereof, unless the Association is "independent" (as defined above) on June 30, 1985 as a result, directly or indirectly, of the activities of BEPW pursuant to this Letter Agreement, and (ii) the Association shall have no obligation to make any quarterly retainer payments hereunder for any quarter following the quarter in which any notice of termination is given hereunder.

BEPW requires standard indemnification covering our use of the information supplied by you to us and our actions which we undertake on your behalf. Such indemnification will survive the completion of services or any determination of BEPW's engagement hereunder. A copy of the Indemnification Agreement is attached. Please sign and return this document with this letter agreement.

We believe that our record in furthering the objectives of our clients speaks for itself, and we are confident that we can help Atlantic Federal achieve its objectives in this undertaking. We look forward to working with you on this assignment.

If the foregoing is acceptable to you, would you please sign the enclosed copy of this letter and return it to us.

Sincerely

BLYTH EASTMAN PAINE
WEBBER INCORPORATED

By: _____
Kenneth L. Rilander
Managing Director

By: _____
Carole Lewis Anderson
Managing Director

Agreed to as of March 20, 1984

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

EXHIBIT "B"

Atlantic Federal Savings and Loan
Association of Fort Myers
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

March 20, 1984

Blyth Eastman Paine Webber Incorporated
1221 Avenue of the Americas
New York, New York 10020

Dear Sirs:

This letter will confirm certain arrangements that we have agreed upon in connection with Atlantic Federal Savings and Loan Association of Fort Lauderdale (the "Association") retaining Blyth Eastman Paine Webber Incorporated ("BEPW") to represent the Association exclusively as financial advisor pursuant to the engagement letter dated today's date between BEPW and the Association (the "Engagement Letter").

In connection with BEPW's services, the Association will furnish or cause to be furnished to BEPW such information and data (hereinafter referred to as the "Information") relating to the Association as BEPW reasonably requests. The Association also will use its best efforts to provide BEPW with reasonable access to the Association's officers, directors, employees and independent accountants. BEPW agrees that the Information, whether oral or written, will be kept confidential by BEPW and by its officers, employees and agents, will be disclosed by BEPW only to such officers, employees and agents of BEPW and its affiliates as need to know the Information in connection with the performance of BEPW's services under the Engagement Letter, and will be used only for purposes of such engagement; and

BEPW agrees that the provisions of this sentence shall survive any termination of BEPW's engagement under the Engagement Letter. The Association recognizes and confirms that in BEPW's performance of its services under the Engagement Letter (a) BEPW may rely upon the Information without independent verification, (b) BEPW does not assume responsibility for the accuracy or completeness thereof whether or not it makes an independent verification, and (c) BEPW will not make nor cause to have made an independent appraisal of the assets of the Association except to the extent provided in the Engagement Letter.

Since BEPW will be acting on behalf of the Association, the Association agrees that it will indemnify and hold harmless BEPW, its officers, directors, agents, employees and affiliates and each person, if any, who controls BEPW within the meaning of Section 15 of the Securities Act of 1933 or Section 20(a) of the Securities Exchange Act of 1934 (BEPW and each such entity and person being hereinafter called an "Indemnified Party") from and against any and all losses, claims, damages and liabilities to which such Indemnified Party may become subject which are (A) related to or arising out of (i) actions taken or omitted to be taken (including any untrue statements made or any statements omitted to be made) by the Association or (ii) actions taken or omitted to be taken by an Indemnified Party with the Association's consent or in conformity with the instructions of, or actions taken or omitted to be taken by, the Association or (B) otherwise related to or arise out of BEPW's acting pursuant to the covenants contained in the section captioned "Financial Analysis of the Association" and "Advisory Issues/Stockholder Interests" in the Engagement Letter. The Association also agrees to reimburse each Indemnified Party for any reasonable expenses incurred (including reasonable fees and disbursements of counsel)

in connection with the investigation of or the preparation for or defense of any formal or informal claim, action, investigation or other proceeding caused by or arising out of or in connection with BEPW's acting pursuant to the Engagement Letter, whether or not BEPW is named party thereto and whether or not any liability results therefrom. The Association will not, however, be responsible for any losses, claims, damages or liabilities (i) for which indemnification is sought solely pursuant to clause (B) of the first sentence of this paragraph which a court of competent jurisdiction shall have determined by a final judgment to have primarily resulted from wilful misconduct or gross negligence on the part of the Indemnified Party seeking indemnification hereunder, or for expenses incurred by such Indemnified Party in connection with such losses, claims, damages or liabilities or (ii) arising out of any settlement by an Indemnified Party of any claim, action or proceeding entered into by or on behalf of such Indemnified Party without the Association's prior written consent.

Promptly after receipt by any Indemnified Party of notice of any complaint, the commencement of any action or proceeding or the actual receipt of written notice of any claim in connection with any matter related to BEPW's activities pursuant to the Engagement Letter. BEPW will notify the Association in writing of such complaint or of the commencement of such action or proceeding or the actual receipt of written notice of any claim and if the Association so elects or is requested by BEPW, the Association will assume the defense of such action, proceedings, or claim, including the employment of counsel reasonably satisfactory to BEPW and the payment of the fees and disbursements of such counsel, in which event the Association shall not be obligated to pay the fees and disbursements of separate counsel for BEPW in such action. In the event, however, that

BEPW's legal counsel shall reasonably determine that defenses may be available to an Indemnified Party that are different from or in addition to those available to the Association or that there is or could reasonably be expected to be a conflict of interest by reason of the Association and an Indemnified Party having common counsel in any action or proceeding, or if the Association has not assumed the defense of any action or proceeding, then BEPW may employ separate counsel to represent or defend it or any Indemnified Party in any such action or proceeding in which it or such Indemnified Party may become involved or is named as defendant and the Association shall pay the reasonable fees and disbursements of such separate counsel; *provided* that the Association shall not be obligated to pay the fees and disbursements of more than one such separate counsel for any one such action or proceeding in any one jurisdiction.

The Association and BEPW agree that if any indemnification or reimbursement sought by an Indemnified Party pursuant to this agreement is held by a court to be unavailable for any reason except, with respect to indemnification sought solely pursuant to clause (B) of the first sentence of the third paragraph hereof, for the reasons specified in the third sentence of such paragraph, then (whether or not BEPW is the Indemnified Person) the Association and BEPW shall contribute to the losses, claims, damages, liabilities and expenses for which such indemnification or reimbursement is held unavailable in such proportion as is appropriate to reflect the relative degree of fault and benefits of the Association on the one hand, and BEPW on the other hand, in connection with the transaction or transactions contemplated by the Engagement Letter, subject to the limitation that in any event BEPW's aggregate contribution to all losses, claims, damages, liabilities and expenses with respect to which contribution is available hereunder shall not exceed

the amount of fees actually received by BEPW pursuant to the Engagement Letter unless such contribution arises out of the gross negligence or wilful misconduct of BEPW or any of its officers, directors, employees and affiliates.

In the event of administrative proceedings or litigation in connection with the services provided under the Engagement Letter, BEPW agrees that its representatives will testify or otherwise assist the Association in preparing for testimony, at the request of the Association. The Association will pay BEPW reasonable and customary additional compensation as agreed upon by BEPW and the Association to cover testifying in connection with such litigation and the preparation for such litigation, proceeding or testimony and will reimburse BEPW for all out-of-pocket expenses reasonably incurred by BEPW in connection therewith, including the fees and disbursements of its legal counsel.

Sincerely,

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

Accepted as of the date first indicated above:

BLYTH EASTMAN PAINE WEBBER
INCORPORATED

By: _____

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT

CASE NO. 87-6643-CIV-SCOTT

BANKATLANTIC, A FEDERAL SAVINGS BANK f/k/a/ ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FORT LAUDERDALE,

Plaintiff,

vs.

BLYTHE EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINE WEBBER, INCORPORATED,

Defendant.

ORDER

THIS CAUSE being before this Court on several motions of both Plaintiff and Defendant, and having reviewed said motions in their entirety, finds as follows:

1. Plaintiff's Motion for Oral Argument as to all motions presently pending before this Court, DENIED.

2. Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction, DENIED.

3. Defendant's Motion to Dismiss for Failure to Plead a Case in Controversy, DENIED.

4. Defendant's Motion to Dismiss Count II, III, IV for failing to plead fraud with particularity, DENIED.

5. Defendant's Motion to Strike Punitive Damages is GRANTED with leave to amend. Plaintiff has failed to plead conduct rising to a level going beyond that of gross negligence. *Como Oil Company, Inc. v. O'Loughlin*, 446 So. 2d 1061 (Fla. 1985).

6. All other Motions not specifically addressed are hereby DENIED.

DONE and ORDERED in Chambers at Miami, Florida, this 21st day of March, 1988.

THOMAS E. SCOTT
UNITED STATES
DISTRICT JUDGE

cc: STEARNS WEAVER MILLER, et al.
RUDEN BARNETT McCLOSKY, et al.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-6643-CIV-SCOTT

ATLANTIC FEDERAL SAVINGS AND LOAN ASSOCIATION OF FT. LAUDERDALE,

Plaintiff,

vs.

BLYTH EASTMAN PAINE WEBBER INCORPORATED, n/k/a PAINE WEBBER, INCORPORATED,

Defendant.

AMENDED COMPLAINT

Plaintiff, Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal"), hereby sues defendant, Blyth Eastman Paine Webber Incorporated ("BEPW"), and alleges as follows:

PARTIES, JURISDICTION AND VENUE

1. This is an action for money damages in excess of $10,000 exclusive of interest and costs, and involves a controversy between citizens of different states. 28 U.S.C. § 1332.

2. Plaintiff Atlantic Federal is a federally chartered savings and loan association doing business in the State of Florida with its principal place of business in Fort Lauderdale, Florida.

3. Defendant BEPW is incorporated under the laws of the State of New York with its principal place of business in New York. BEPW is doing business in the State of Florida.

4. Subsequent to the acts of defendant giving rise to this lawsuit, BEPW was acquired by Paine Webber, Incorporated ("Paine Webber"). Paine Webber is incorporated under the laws of the State of Delaware with its principal place of business in New York. Paine Webber is doing business in the State of Florida.

FACTS

Atlantic Federal: From Small Mutual to a Public Company

5. From its inception in 1952 until 1983, Atlantic Federal was a federally chartered mutual savings and loan association. As such, Atlantic Federal had no stockholders, and Atlantic Federal's management was responsible only to its depositors and to those government entities which regulated it.

6. In 1983, in order to increase its capital, Atlantic Federal converted from a mutual association to a publicly held stock company. While the conversion raised capital for Atlantic Federal, it created a series of unprecedented challenges and difficulties for Atlantic Federal's management.

7. At the time, Atlantic Federal was managed by a group of officers and directors who had experience in dealing with the problems of a relatively small mutual association. Its management, however, did not have the experience required to deal with the myriad duties and responsibilities of a public company which answered not only to its depositors and regulators, but to its shareholders and the public markets for its stock.

8. Management's concerns were exacerbated by two independent economic factors. First, high interest rates and the deregulation of banking were making it increas-

ingly difficult for management to profitably operate the association. Second, a number of entities had assembled sizeable blocks of Atlantic Federal's new common stock. Atlantic Federal's management itself owned little of the association's stock. Management was faced with dealing with public shareholders, changing market conditions, and insecurity with respect to their future employment.

BEPW Solicits Atlantic Federal

9. During this period, BEPW had been performing some limited brokerage functions on behalf of Atlantic Federal. BEPW had become aware of the fact that certain entities had assembled blocks of Atlantic Federal stock. BEPW perceived Atlantic Federal as a company with weak management from which BEPW could extract sizeable fees and commissions in exchange for comforting advice. BEPW told the management of Atlantic Federal that it had special expertise which would aid management in fending off an unwanted takeover, and would help management better organize its assets and liabilities.

10. Beginning in early 1984, in reliance upon BEPW's representations of special expertise, the management of Atlantic Federal retained BEPW as "financial advisor." Atlantic and BEPW memorialized their arrangement in a document referred to as an "Engagement Letter" which was executed by representatives for each party and dated March 20, 1984. A copy of that letter is attached hereto as Exhibit "A."

11. As memorialized in the Engagement Letter, BEPW undertook to perform a thorough analysis of Atlantic Federal's operations and business plan. Specifically, BEPW undertook to analyze, among other factors, (i) Atlantic Federal's operating results, (ii) its lending and investment activities, and (iii) its deposit-taking and borrowing activities. BEPW was also retained to advise

Atlantic Federal "whether certain actions by third parties [were] in the best interests of the Association and its stockholders." If such actions were not deemed to be in the best interests of Atlantic Federal and its stockholders, BEPW undertook to work with Atlantic Federal and its counsel to develop a strategy to deal with these actions. In return for these services, the agreement provided that BEPW be paid $100,000. $50,000 was actually invoiced and paid by Atlantic Federal.

The Effect of High Interest Rates on Atlantic Federal

12. With regard to its financial condition, Atlantic Federal's management was at the time it retained BEPW concerned about the negative impact caused by the preceding years of double-digit inflation. Because Atlantic Federal's assets were essentially in the form of long-term mortgages fixed at relatively low interest rates, it faced large losses during the years in which its cost of funds, which was variable, soared. During this period, Atlantic Federal was faced with what is known as a "negative spread." That is, the market cost of funds which Atlantic Federal was required to pay to its depositors had increased to a point where this cost was greater than the revenue which Atlantic Federal was receiving on its portfolio of mostly fixed-rate mortgages. This problem was, to a great degree, common throughout the savings and loan industry.

13. Ironically, by 1984 Atlantic Federal had suffered through and survived the worst of the problems caused by high interest rates and the resultant negative spread. As interest rates had reached their peak in earlier years, Atlantic Federal had systematically retired older, low interest rate mortgages and replaced them in its portfolio with newer, higher rate and adjustable rate mortgages. Atlantic Federal's management, however, was still badly

shaken by the upheavals of the previous years, and was particularly susceptible to advice — be it good or bad — which they hoped would protect them from a recurrence of this problem.

BEPW Takes Advantage of Atlantic Federal's Fears

14. By early 1984, BEPW has begun to regularly advise Atlantic Federal's management with regard to perceived takeover threats and management began to look to BEPW as valued and trusted advisors. BEPW took steps to foster such an image with Atlantic Federal's management.

15. In addition to being advisors, BEPW's personnel were also salesmen. After having achieved a position of trust and confidence, BEPW's salesmen began to offer Atlantic Federal the opportunity to participate in transactions purportedly aimed at providing Atlantic Federal with protection from future interest rate risk.

The "Interest Rate Swap"

16. BEPW advised Atlantic Federal that a beneficial "hedge" against interest rate risk was an investment device known as an "interest rate swap." In fact, in the form which BEPW proposed, such "interest rate swaps" offered Atlantic Federal no real protection against rising interest rates. Instead, these swaps would result in substantial losses if interest rates dropped — which, in fact, they did.

17. BEPW told Atlantic Federal that a swap was necessary because too many of its liabilities were subject to variable rates, while the return on many of its mortgage portfolio assets were fixed. BEPW warned Atlantic Federal that if interest rates were to rise again, Atlantic Federal could be forced to pay for its funds at a rate higher than the rate of return on its fixed rate mortgages.

Atlantic Federal would again be faced with a "negative spread."

18. BEPW counselled Atlantic Federal that it should enter into a transaction with another institution in which Atlantic Federal could "swap" a portion of its debt obligations subject to variable rates for debt obligations subject to fixed rates. This would be accomplished, BEPW explained, by entering into interest rate swaps with another financial institution.

19. Pursuant to the "swap", Atlantic Federal and its swap partner would not exchange principal obligations; rather, they would merely agree to compensate each other in such a manner equivalent to Atlantic Federal paying a fixed rate of interest on an agreed-upon principal amount, while its partner would assume interest obligations at a variable rate. In essence, Atlantic Federal would be "swapping" some of its variable-rate interest obligations for fixed rate obligations.

The Undisclosed Problems with the Swaps.

20. As marketed by BEPW, the interest rate swaps appeared to represent a solid and prudent vehicle to hedge against interest rate risk in the future. In fact, BEPW knew that these swaps, in the form marketed by BEPW, would provide no such protection for Atlantic Federal, but would in fact provide Atlantic Federal with only a lose/lose scenario. BEPW failed to provide Atlantic Federal with facts which would have been material to its investment decision. These facts include, but are not limited to, the following:

(a) BEPW recommended to Atlantic Federal two swaps in the principal amounts of $35,000,000 and $50,000,000, respectively. The total principal amount of Atlantic Federal's deposits was nearly $1.5 billion. The total principal amount of swaps,

therefore, was not of adequate size to provide a meaningful hedge against another spike in interest rates. Even with the swaps, the vast majority of Atlantic Federal's debt would still be subject to variable market interest rates. The relatively minimal protection provided by the swaps would not have been adequate to protect Atlantic Federal against the cataclysmic impact of another national bout with high interest rates. Conversely, if interest rates would fall (as in fact they did), the terms of the interest rate swap required Atlantic Federal to pay millions of dollars to its swap partner. BEPW failed to inform Atlantic Federal that under either scenario, Atlantic Federal would lose.

(b) BEPW sold the swap transactions to Atlantic Federal by convincing Atlantic Federal that it could "match" the fixed-rate obligation it would acquire against certain fixed-rate mortgages in its portfolio, and thereby "lock in" a profit. This "profit", however, was illusory. For instance, BEPW told Atlantic Federal that it could "match" $50,000,000 of its 13½% mortgages against a $50,000,000 swap transaction, which would "lock in" a cost-of-funds at a fixed-rate of 12.45%. BEPW failed to disclose to Atlantic Federal the illusory nature of this "locked in" profit. In fact, BEPW chose to "match" the cost of funds against some of Atlantic Federal's most profitable long-term mortgages. The average return on Atlantic Federal's mortgages was much lower than 13½%, and in fact, lower than 12.45%. In fact, BEPW was recommending a transaction which would "lock in" a loss.

(c) Moreover, BEPW failed to counsel Atlantic Federal that, if interest rates fell, customers would refinance and retire their 13½% mortgages. The

"locked in" profit against the 12.45% cost of funds was therefore doubly illusory.

(d) BEPW failed to disclose to Atlantic Federal that the results obtained through the interest rate swaps — assuming such results were in the best interest of Atlantic Federal — could be achieved through alternatives which would be less costly to Atlantic Federal.

(e) BEPW failed to disclose to Atlantic Federal that it was simultaneously providing investment advice and other services to Homestead Savings, the federal savings and loan association with which Atlantic Federal agreed to swap interest obligations. BEPW also failed to disclose to Atlantic Federal that Homestead was an improper partner for a swap transaction.

The Swap Agreements

21. On March 23, 1984 and August 3, 1984, in reliance on BEPW's advice, Atlantic Federal entered into Separate Interest Exchange Agreements with Homestead Savings. (Copies of those Agreements are attached hereto as Exhibits B and C, respectively.) In essence, the agreements provide for Atlantic Federal to "swap" amounts due on its variable rate obligations for amounts due on Homestead's fixed rate obligations at 12.00% and 12.45% respectively. Therefore, with reference to the first agreement, if the applicable interest rate is greater than 12%, Homestead was to pay Atlantic Federal the difference between the amount due on the variable rate and the amount due on 12%. Conversely, were the rate to dip below 12%, Atlantic Federal was (and is) obligated to pay to Homestead the difference between the amounts due on the fixed and variable rates.

A Guaranteed Loss For Atlantic Federal, and a Guaranteed Profit for BEPW

22. As shown in paragraph 19(a) above, it was impossible for Atlantic Federal to profit from the swap agreements, whether rates went up or down. BEPW, on the other hand, was the only party guaranteed a profit in these transactions. BEPW billed and collected from Atlantic Federal the sum of $175,000 for its "services" in "arranging" the first swap transaction.

23. Atlantic Federal's losses from these transactions have been staggering. Since early 1984, Atlantic Federal has incurred liabilities totalling $12,341,141.29 to Homestead under these Agreements, in addition to the $225,000 paid to BEPW for its "services" in "arranging" these transactions, and for providing investment advice.

COUNT I

BREACH OF FIDUCIARY DUTY

24. Atlantic Federal repeats and realleges paragraphs 1 through 23.

25. A financial advisor stands in a fiduciary relationship with its client, and, as a matter of law, custom and practice, is obligated to conduct itself with the utmost good faith.

26. Atlantic Federal, by engaging defendant as its financial advisor, reposed trust and confidence in defendant to discharge its responsibilities prudently, and act properly and carefully in the rendering of financial advice to Atlantic Federal. Specifically, Atlantic Federal placed its trust and confidence in defendant, who possessed superior knowledge to recommend an "interest rate swap" only after studying it sufficiently to become informed as to its nature, cost, risks, financial prognosis; to

inform Atlantic Federal of all of the risks involved in an "interest rate swap"; to make a full and fair disclosure of all material facts; to refrain from omitting material facts or misrepresenting any fact material to the "interest rate swap"; and to refrain from self-dealing.

27. Defendant owes Atlantic Federal a fiduciary duty of care and good faith in providing financial advice to the Atlantic Federal.

28. Defendant had breached its duty of care and good faith by failing to properly advise Atlantic Federal, as described above.

29. As a proximate cause of defendant's breach of its duty, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

30. The defendant's conduct was reckless, willful and wanton, demonstrating an entire want of care and good faith and an inattention to duty.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT II

FRAUD

31. Atlantic Federal repeats and realleges paragraphs 1 through 23.

32. Defendant made misrepresentations to Atlantic Federal of facts material to the "interest rate swap," and failed to inform Atlantic Federal of certain material facts.

33. Defendant had superior knowledge of the complexities of and risks involved in an interest rate swap.

Defendant owes a duty of full disclosure of material facts to Atlantic Federal and is charged with the knowledge of the truth or falsity of those representations.

34. Defendant knew or should have known of the falsity of its representations to Atlantic Federal, at the time made.

35. Defendant's misrepresentations and deliberate concealment of material facts were intentional and made for the purpose of inducing Atlantic Federal to enter into the "interest rate swap" with Homestead Savings.

36. Atlantic Federal has reasonably relied to its detriment on the correctness of defendant's representations and was induced thereby to enter into the "interest rate swap." But for defendant's misrepresentations and deliberate concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

37. As a direct and proximate result of defendant's intentional misrepresentations and deliberate concealment of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

38. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT III

CONSTRUCTIVE FRAUD

39. Atlantic Federal repeats and realleges paragraphs 1 through 23.

40. A financial advisor stands in a fiduciary relationship with its client, and, as a matter of law, custom and practice, is obligated to conduct itself with the utmost good faith.

41. Atlantic Federal, by engaging defendant as its financial advisor, reposed trust and confidence in defendant to discharge its responsibilities prudently, and act properly and carefully in the rendering of advice to Atlantic Federal. Specifically, Atlantic Federal placed its trust and confidence in defendant, who possessed superior knowledge, to recommend an "interest rate swap" only after studying it sufficiently to become informed as to its nature, cost, risks and financial prognosis; to inform Atlantic Federal of all of the risks involved in an "interest rate swap"; to make a full and fair disclosure of all material facts; to refrain from omitting material facts or misrepresenting any fact material to the "interest rate swap"; and to refrain from self-dealing.

42. Defendant owes Atlantic Federal a fiduciary duty of care and good faith in providing financial advice to Atlantic Federal.

43. Defendant made misrepresentations to Atlantic Federal, and failed to disclose to Atlantic Federal, facts material to the "interest rate swap."

44. Defendant knew or should have known of the falsity of its representations at the time made.

45. Defendant made such misrepresentations to Atlantic Federal, for the purpose of inducing Atlantic Fed-

eral to rely on them and enter into the "interest rate swap."

46. Atlantic Federal reasonably relied, to its detriment, on the correctness of defendant's representation and was induced thereby to enter into the "interest rate swap." But for the defendant's misrepresentations and concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

47. As a proximate result of defendant's misrepresentation and omissions of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

48. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT IV

FRAUDULENT CONCEALMENT

49. Atlantic Federal repeats and realleges paragraphs 1 through 23.

50. Defendant had superior knowledge of investment instruments and the financial markets. Defendant owes a duty of full disclosure to Atlantic Federal of the risks involved in any transaction in which it advises Atlantic Federal.

51. Defendant intentionally and deliberately concealed facts material to the "interest rate swap" from

Atlantic Federal, including facts not discoverable by ordinary observation, and has engaged in trickery to defraud Atlantic Federal.

52. Defendant intentionally and deliberately concealed material facts from the Atlantic Federal for the purposes of inducing Atlantic Federal to rely thereon.

53. Atlantic Federal did rely to their detriment on the correctness and completeness of the defendant's representations, and was induced thereby to enter into the "interest rate swap." But for the defendant's intentional and deliberate active concealment of material facts concerning Atlantic Federal's risks, Atlantic Federal would not have entered into the "interest rate swap" with Homestead Savings.

54. As a proximate result of defendant's intentional and deliberate active concealment of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

55. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT V

NEGLIGENT MISREPRESENTATION

56. Atlantic Federal repeats and realleges paragraphs 1 through 23.

57. Defendant made misrepresentations to Atlantic Federal of facts material to the "interest rate swap."

58. Defendant had superior knowledge of the complexities and risks involved in an interest rate swap. Defendant owes a duty of full disclosure of material facts to Atlantic Federal, and is changed with the knowledge of the truth or falsity of those representations.

59. Defendant knew or should have known of the falsity of its representations to the Atlantic Federal, at the time made.

60. Defendant's misrepresentation of material facts were made for the purpose of inducing Atlantic Federal to enter into the "interest rate swap" with Homestead Savings.

61. Atlantic Federal reasonably relied, to its detriment, on the defendant's representations. As a direct and proximate result of defendant's misrepresentations of material facts, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

62. Defendant's conduct was knowing and intentional, and demonstrates an entire want of care and disregard for the rights of the Atlantic Federal.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT VI

NEGLIGENCE

63. Atlantic Federal repeats and realleges paragraphs 1 through 23.

64. Under the Engagement Letter, defendant had a duty to exercise care in the review and analysis of, among other things, Atlantic Federal's operating results, and

lending and investment activities, and in providing advice to Atlantic Federal.

65. Defendant, as Atlantic Federal's investment advisor, owed Atlantic Federal a duty to exercise care to research and determine the costs, risks and financial prognosis of an interest rate swap before advising Atlantic Federal; a duty to exercise care in informing Atlantic Federal of the risks involved in an interest rate swap; a duty to refrain from self-dealing; a duty to fully and accurately represent material facts; and a duty to properly supervise its employees, agents, associates, brokers and advisors in advising the Atlantic Federal.

66. Defendant specifically represented that it possessed the requisite skill and knowledge, and would exercise due care in performing these duties.

67. Defendant failed to exercise due care in performing the duties owed to Atlantic Federal.

68. Defendant's conduct was reckless, willful and wanton, demonstrating an entire want of care and good faith, and an inattention to duty.

69. By reason of defendant's negligence, Atlantic Federal has been severely damaged as set forth in paragraphs 22 and 23.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

COUNT VII

BREACH OF CONTRACT

70. Atlantic Federal repeats and realleges paragraphs 1 through 23.

71. As set forth above, Atlantic Federal retained defendant as "financial advisor," and memorialized their arrangement in a document referred to as the Engagement letter. The Engagement Letter was executed by representatives of Atlantic Federal and defendant, and dated March 20, 1984.

72. Defendant breached the terms of the Engagement Letter by failing to perform the services defendant agreed to provide in consideration of compensation from Atlantic Federal, as provided in the Engagement Letter.

73. The Engagement Letter contained an implied covenant to act in good faith and of fair dealing between the parties. Defendant breached its obligation to act in good faith by failing to comply with the terms of the Engagement Letter.

74. As a result of defendant's breach, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory damages, together with prejudgment interest and the costs of this action.

COUNT VIII

PROFESSIONAL MALPRACTICE

75. Atlantic Federal repeats and realleges paragraphs 1 through 23.

76. Defendant has held itself out to be a licensed investment advisor under the Florida Securities and Investor Protection Act, and represented that its employees, agents, brokers, and advisors possessed the requisite skills and knowledge and would exercise due care in performing its duties as a financial advisor.

77. Atlantic Federal retained defendant as a "financial advisor" as memorialized in the Engagement Letter entered into by Atlantic Federal and defendant, and dated March 20, 1984.

78. Defendant undertook to conduct research on various vehicles for investment and fiscal planning and to provide advice to Atlantic Federal on such matters. Defendant had a duty to exercise due care as a professional with special knowledge, intellect and ability in the researching and advising of Atlantic Federal on various investment opportunities. Furthermore, defendant was obliged to provide full disclosure of facts material to these opportunities, including the interest rate swap.

79. Defendant failed to exercise the due care required of a professional with special knowledge, intellect and ability.

80. But for the defendant's failure to exercise the due care expected of a financial advisor performing such duties, Atlantic Federal would not have entered into the "interest rate swap."

81. By reason of defendant's failure to exercise care in the performance of its duties, Atlantic Federal has been damaged as set forth in paragraphs 22 and 23.

82. The conduct of defendant was reckless, willful and wanton, demonstrating an entire want of care and good faith and an inattention to duty.

WHEREFORE, Atlantic Federal demands judgment against defendant for compensatory and punitive damages, together with prejudgment interest and the costs of this action.

Respectfully submitted,

STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Attorneys for Plaintiff
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

By: _____
EUGENE E. STEARNS
ALAN H. FEIN
LISA K. BENNETT
M. SCOTT KLEIMAN

Dated December 23, 1987

DEMAND FOR JURY TRIAL

Plaintiff, pursuant to Rule 38(b), Fed. R. Civ. P., hereby demands trial by jury of all issues so triable.

Respectfully submitted,

STEARNS WEAVER MILLER
WEISSLER ALHADEFF &
SITTERSON, P.A.
Attorneys for Plaintiff
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130
(305) 789-3200

By: _____
EUGENE E. STEARNS
ALAN H. FEIN
LISA K. BENNETT
M. SCOTT KLEIMAN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of December, 1987 to: BENNETT FALK, ESQ., Ruden, Barnett, McClosky, Smith, Schuster & Russell, P.A., One Biscayne Tower, Suite 2020, Miami, FL 33131.

By: _____
LISA K. BENNETT

EXHIBIT "A"

BLYTH EASTMAN PAINE WEBBER
INCORPORATED
1221 Avenue of the Americas
New York, New York 10020
(212) 730-8500

March 20, 1984

Mr. Donald V. Streeter
President, Chairman of the Board,
and Chief Executive Officer
Atlantic Federal Savings and Loan
Association of Fort Lauderdale
1750 East Sunrise Boulevard
Fort Lauderdale, Florida 33304

Dear Don:

This Letter Agreement is to confirm that Blyth Eastman Paine Webber Incorporated ("BEPW") has been retained by Atlantic Federal Savings and Loan Association of Fort Lauderdale ("Atlantic Federal" or the "Association") as financial advisor. A summary of the services which we will provide under this engagement and the compensation therefor follows.

Financial Analysis of the Association

We will undertake an analysis of Atlantic Federal as follows:

1. The preparation of a study framework of the Association which will include:

a. A review and analysis of the Association's operating results;

b. A review and analysis of the Association's lending and investment activities;

c. A review and analysis of the Association's deposit-taking and borrowing activities;

d. A review and analysis of the Association's primary market area, including the competitive and economic environment, and the population, personal income, unemployment and housing characteristics thereof;

e. A review of comparable savings and loan associations;

f. A review of recent purchase and sale transactions of generally similar associations and financial institutions, as appropriate.

2. A review and analysis of the Association's financial performance, including profitability, growth, financial condition and components of income and expense.

The steps to be taken to perform the above-stated work will include, but not be limited to:

1. A review of the Association's last five years' audited financial statements.

2. A review of the Association's Annual Report to Stockholder's forms 10-K and 10-Q, semi-annual Federal Home Loan Bank reports and other reports filed with the Federal Home Loan Bank of Atlanta or the Federal Home Loan Bank Board.

3. Visits to Atlantic Federal's facilities, as appropriate.

4. Discussions with management concerning the Association's business and its outlook, including future operating plans, goals and objectives.

5. Such other reviews and analyses as we deem appropriate to aid in completing our valuation work.

Advisory Issues/Stockholder Interests

We will advise the Association, in coordination with Atlantic Federal and its legal counsel, in the determination of whether certain actions by third parties are in the best interests of the Association and its stockholders. If such actions are deemed not to be, we will assist the Association in coordination with its counsel in developing a strategy to deal with those actions. In connection with these issues, BEPW will review, among other things, the following:

1. The market for and trading history of the Association's shares.

2. The stockholder composition of Atlantic Federal, including analysis of CEDE accounts, with emphasis and attention to dissident interests.

3. Communication policy between the Association and the investment community in general.

4. Third party actions which Atlantic Federal might initiate which are determined to be in the best interest of the stockholders.

Compensation and Indemnification

Our engagement fee covering the services outlined in this letter is $100,000, $50,000, payable upon execution of this agreement and $50,000 payable September 30, 1984. In addition, Atlantic Federal will pay BEPW a quarterly retainer of $25,000 for assistance in developing strategies with regard to dissident interests and other issues relating to stockholder interests. Quarterly retainer payments will commence with the first quarter of calendar year 1985 and shall thereafter be due and payable as of the last business day of each calendar quarter thereafter (commencing March 29, 1985) unless the engagement of BEPW hereunder is terminated as hereafter provided. If

Atlantic Federal is independent on June 30, 1985, the Association will pay BEPW a fee of $150,000 for its general consulting and advisory services. For purposes of this letter, the term "independent" shall mean that (i) no person (as the term "person" is used in Sections 13(d) or 14(d)(2) of the Securities Exchange Act of 1934, as amended) shall have acquired beneficial ownership of more than 50% of the issued and outstanding shares of common stock of the Association or shall have offered to purchase such number of shares of common stock which offer shall not have thereafter been withdrawn or preliminarily enjoined and (ii) individuals who as of the date thereof constituted a majority of the Board of Directors cease for any reason to constitute a majority thereof by or as of June 30, 1985 unless the election, or the nomination for election, by the Association's shareholders of each new Director of the Association was approved by a vote of a majority of the Directors of the Association who were Directors as of the date hereof.

In the event that BEPW is requested to render an opinion as to fairness or adequacy from a financial point of view of any unsolicited offer involving the Association, we will review with you the questions of an additional fee in an amount up to $100,000, depending upon the complexity and use of the opinion and other factors. In connection with a proxy contest or an unsolicited offer involving the Association or a related transaction, BEPW would receive such additional fees as we would mutually agree upon at the time of such event. In connection with any and all of the services described above, BEPW will be reimbursed for its reasonable out-of-pocket expenses, including reasonable fees and disbursements of BEPW counsel.

In addition, during the period of the engagement of BEPW hereunder Atlantic Federal will give BEPW a

right of first refusal to act as financial advisor with regard to any transaction not contemplated by this agreement at standard rates of compensation. In the event that financing requiring an intermediary is related to our activities under this engagement, Atlantic Federal agrees that BEPW will have the exclusive right to act as agent or managing underwriter in connection with such financing.

This engagement may be terminated by either party upon 30 days written notice to the other, provided however, that any remaining amount of the retainer will come due on the date of termination, except that (i) the Association shall have no obligation to pay any amount otherwise payable pursuant to the last sentence of the first paragraph of this Section captioned "Compensation and Indemnification" if this engagement is terminated by notice given within 75 calendar days of the date hereof, unless the Association is "independent" (as defined above) on June 30, 1985 as a result, directly or indirectly, of the activities of BEPW pursuant to this Letter Agreement, and (ii) the Association shall have no obligation to make any quarterly retainer payments hereunder for any quarter following the quarter in which any notice of termination is given hereunder.

BEPW requires standard indemnification covering our use of the information supplied by you to us and our actions which we undertake on your behalf. Such indemnification will survive the completion of services or any determination of BEPW's engagement hereunder. A copy of the Indemnification Agreement is attached. Please sign and return this document with this letter agreement.

We believe that our record in furthering the objectives of our clients speaks for itself, and we are confident that we can help Atlantic Federal achieve its objectives in this undertaking. We look forward to working with you on this assignment.

If the foregoing is acceptable to you, would you please sign the enclosed copy of this letter and return it to us.

Sincerely,

BLYTH EASTMAN PAINE
WEBBER INCORPORATED

By: _____
Kenneth L. Rilander
Managing Director

By: _____
Carole Lewis Anderson
Managing Director

Agreed to as of March 20, 1984

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION
OF FORT LAUDERDALE

By: _____

EXHIBIT "B"

INTEREST EXCHANGE AGREEMENT

INTEREST EXCHANGE AGREEMENT ("Agreement") dated as of March 23, 1984 between Atlantic Federal Savings and Loan Association ("Atlantic Federal") an association organized under the laws of the United States of America and Homestead Savings, a Federal Savings and Loan Association ("Homestead").

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

1. As used in this Agreement:

"Business Day" means the day on which Banks are open in New York for the transaction of business required for this Agreement.

"Early Termination Date" means a date designated pursuant to paragraph 4 hereof prior to the Termination Date.

"Fixed Amount" in respect of a Settlement Date means an amount equal to interest on the Notional Principal Amount calculated utilizing the Fixed Interest Rate for the relevant period and shall be equal to $2,100,000.00 in respect of each Settlement Date after March 23, 1984.

"Fixed Interest Rate" shall be a rate of 12.00% per annum based on a 360-day year and twelve 30-day months.

"Interest Period" means each period beginning on a Settlement Date (or, with respect to the first Interest Period, on March 23, 1984) and ending on the day immediately preceding the next Settlement Date.

"Net Termination Amount" has the meaning set forth in paragraph 4 hereof.

"Notional Principal Amount" means $35,000,000.

"Settlement Date" means September 23 and March 23 of each year prior to and including the Termination Date, commencing March 23, 1984, or, if any such day is not a Business Day, the next Business Day.

"Termination Date" means March 22, 1991, or, if such day is not a Business Day, the next Business Day.

"Variable Amount" in respect of a Settlement Date means an amount equal to interest calculated for the Interest Period immediately preceding such Settlement Date on the Notional Principal Amount in accordance with paragraph 2 hereof, utilizing the Variable Interest Rates in effect from time to time during such Interest Period. Interest shall be calculated on the basis of a 360-day year and twelve 30-day months.

"Variable Interest Rate" has the meaning set forth in paragraph 2 hereof.

"Weighted Average Per Annum Discount Rate" means a rate computed by dividing the total discount for a United States Treasury bill auction (total net proceeds subtracted from the full face value at maturity date) by the full face value and multiplying the quotient by 360 days divided by the number of days the Treasury bill is to be outstanding.

2. The Variable Interest Rate shall be equal to the simple average of the Weighted Average Per Annum Discount Rate (expressed on a bond equivalent basis for

a 365 or 366 day year and rounded to three decimal places) of all auctions of direct obligations of the United States having a maturity of ninety-one days ("91-day Treasury bills") occurring between Settlement Dates, as published by the Board of Governors of the Federal Reserve System or as reported by the Department of the Treasury including the results of the auction, if any, which took place on the prior Settlement Date, but excluding the results of the auction occurring on the current Settlement Date. If a 91-day Treasury Bill auction occurs on the first day of the first Interest Period, the results of that auction will be included in the average rate.

3. *Interest Exchange.* (a) On every Settlement Date, Homestead shall determine, and shall certify to Atlantic Federal, the difference between the Fixed Amount ("A") for such Settlement Date and the Variable Amount ("B") for such Settlement Date. If, as so determined, A is less than B, Homestead shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Atlantic Federal at Federal Reserve Board of Miami, Account Number 267083763; and if, as so determined, B is less than A, Atlantic Federal shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Homestead at Manufacturers Hanover Trust Company, Account Number 144096697. If, as so determined, there is no such difference, Homestead shall so certify in writing to Atlantic Federal and the parties will be treated as having performed their relevant obligations for the purposes of this paragraph 3 without any payment having to be made.

(b) Should Homestead fail to deliver the determination referred to in subparagraph 3(a) to Atlantic Federal by the Third Business day after any settlement date,

Atlantic Federal shall make the determination and certify it to Homestead. In that event, the payment required by subparagraph 3(a) still will be due and payable at the time provided in subparagraph 3(a).

(c) All payments under this Agreement shall be made in U.S. dollars in immediately available funds.

4. *Early Termination.* (a) Either Atlantic Federal or Homestead (the "Designator") may designate as the Early Termination Date any Business Day prior to the Termination Date which falls within thirty days after a day on which any of the following events shall have occurred and shall be continuing with respect to the other party (the "Designee"): (i) the Designee has failed to make a payment required under Paragraph 3(a) of this Agreement and has not remedied such default within a period of five Business Days of notice of such default having been received from the Designator; or (ii) the Designee has become insolvent or Bankrupt or admits in writing its inability to pay its debts as they mature, or taken any action for the purpose of entering into a winding-up, dissolution, Bankruptcy, reorganization, or similar proceeding analogous in purpose or effect, or any order has been made by any competent court or any resolution passed for the appointment of a liquidator or trustee in Bankruptcy of the Designee or the Designee has appointed or suffered to be appointed any receiver or trustee of the whole or any material part of its assets or business, or has entered into any composition with its general creditors; or (iii) any indebtedness in respect of borrowed money of the Designee is declared to be due and payable prior to its stated maturity by reason of any default by the Designee in the performance or observance of any obligation or condition, or any such indebtedness of the Designee is not paid when due (after giving effect to any applicable grace period).

(b) Designation of the Early Termination Date shall be accomplished by the Designator giving written notice thereof which notice shall be received by the Designee not less than seven Business Days prior to the date so designated and which shall specify in reasonable detail the basis upon which it is given.

(c) In the event that either Atlantic Federal or Homestead shall serve upon the other a notice pursuant to clause (b) above, the Designator shall:

(i) determine a "discount rate", as of the second Business Day prior to the Early Termination Date equal to the yield to maturity, on a bond equivalent basis, of Treasury Notes issued by the United States Government due on the Termination Date or the maturity date nearest thereto. In the event more than one such Treasury Note issue matures on the Termination Date (or nearest date thereto), the yield on the Treasury Notes which have a market value nearest to par value shall be used.

(ii) calculate a "fixed rate termination amount" equal to the sum of each of (1) the amounts due on each remaining Settlement Date discounted to the Early Termination Date using the rate determined under sub-clause (i) above and (2) the Fixed Amount which is unpaid from the most recent Settlement Date.

(iii) calculate a "variable rate termination amount" equal to the sum of (1) the "Unpaid Variable Amount", (2) the "interim Variable Amount" and (3) the "Subsequent Variable Amount" such that:

(1) the Unpaid Variable Amount is the amount unpaid from the most recent Settlement Date.

(2) the Interim Variable Amount pertains to the period between the most recent Settlement Date and the next Settlement Date and equals the total of amounts (A) plus (B) such that:

(A) is an amount accrued for the number of days in the period beginning on the most recent Settlement Date and ending on and including the Early Termination Date, ("elapsed days") calculated by dividing 360 into the product of the Variable Interest Rate in effect during such period multiplied by both the Notional Principal Amount and the elapsed days and,

(B) is an amount accrued for the period from the day following the Early Termination Date and ending the day prior to the next Settlement Date calculated by dividing 360 into the product of the Notional Principal Amount multiplied by the remaining days in the period (180 days minus elapsed days) and the discount rate established in sub-clause (i) above and

(3) Subsequent Variable Amount pertains to amounts due on each Settlement Date subsequent to the next Settlement Date and is equal to one-half of the product of the Notional Principal Amount times the discount rate determined in sub-clause (i) above discounted to the Early Termination Date using the discount rate determined under sub-clause (i) above.

(iv) calculate a "Net Termination Amount" which shall be equal to the difference between the amount computed in sub-clauses (ii) and (iii) above,

and shall be in favor of Homestead if (ii) is greater than (iii) and shall be in favor of Atlantic Federal if (iii) is greater than (ii).

And the Designee shall, without prejudice to any other amounts due or payable hereunder, pay to the Designator not later than two Business Days subsequent to a demand in writing therefor (which demand shall be not earlier than the second Business Day prior to the Early Termination Date) the Net Termination Amount, if the same is in favor of the Designator, it being understood that the Designator shall in no event be obliged to pay the Net Termination Amount, even if the same is in favor of the Designee, to the Designee.

(d) The parties hereto agree that the amounts recoverable by the Designator pursuant to clause (c) of this paragraph 4 are a reasonable pre-estimate of the Designator's loss and are not a penalty; such amounts are payable as liquidated damages to the Designator for the loss of its bargain and the loss of its protection against future risks; and (without prejudice, however, to the rights and remedies of the Designator hereunder in respect of any other breach of this Agreement or as otherwise specifically provided herein) the Designator shall not be entitled to recover any additional damages hereunder as a consequence of such losses; and the parties further agree that a statement in reasonable detail by the Designator showing the calculation of the foregoing amounts shall be conclusive in the absence of manifest error.

5. *Representations and Warranties.* To induce the other party to enter into this Agreement, Atlantic Federal represents and warrants that it is an entity organized and duly existing under the laws of the United States of America, and Homestead represents and warrants that it is an entity organized and duly existing under the laws of

the United States of America, and Atlantic Federal and Homestead each represent, warrant and covenant with respect to itself that: (a) it is duly authorized by all necessary corporate action to execute, deliver and perform this Agreement; (b) the execution, delivery and performance of this Agreement does not conflict with any provisions of the charter or bylaws (or equivalent constituent documents) of such party or of any agreement binding upon it; and (c) none of the events (without regard to any provision requiring the lapse of time or giving of notice or both) specified in clause (a) of paragraph 4 hereof has occurred and is continuing, and it will notify the other party promptly upon it becoming aware of any such event.

6. All payments made hereunder shall be made without any set-off or counterclaim (other than a set-off or counterclaim arising from a default by the other party in the performance of its obligations hereunder).

7. The rights (including without limitation the rights under paragraph 4 hereof) and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law and shall not affect or impair any right to which any party may be entitled by law.

8. In the event it shall be or become unlawful for either party to perform its obligations hereunder as a result of existing or future laws or regulations then either party may in its sole discretion give notice to the other party specifying such circumstances and declaring the obligations of the parties hereto as provided in this Agreement to be terminated as of the date specified in such notice; *provided, however*, that such termination shall not release either party from its obligations accrued and due hereunder as of the date of such notice. In the event of such termination, the parties' rights and obligations will be determined as outlined in paragraph 4

herein, with the party whose conduct is unlawful being the designee.

9. Any notice to be given hereunder shall be given in writing and shall be deemed to have been given (except as otherwise expressly set forth herein) if given by registered mail four days after posting. Any notice shall be addressed and sent to Atlantic Federal, Attention: James J. Hunter; and to Homestead Attention: John P. Halicky.

10. No failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

11. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

12. This Agreement may be executed in counterparts, each of which shall be deemed an original.

13. This Agreement may not be assigned by either party hereto, without the prior written consent of the other party hereto and any purported assignment without such consent shall be void.

14. In the event of any action or proceeding in regard to the subject matter of this contract, the prevailing party shall be entitled to recover its reasonable costs and attorney's fees.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION

By _____
Title:

HOMESTEAD SAVINGS

By _____
Title:
John P. Halicky
Senior Vice President

EXHIBIT "C"

INTEREST EXCHANGE AGREEMENT

INTEREST EXCHANGE AGREEMENT ("Agreement") dated as of August 3, 1984 between Atlantic Federal Savings and Loan Association ("Atlantic Federal") an association organized under the laws of the United States of America and Homestead Savings, a Federal Savings and Loan Association ("Homestead").

In consideration of the mutual agreements herein contained, the parties hereto agree as follows:

1. As used in this Agreement:

"Business Day" means the day on which Banks are open in New York for the transaction of business required for this Agreement.

"Early Termination Date" means a date designated pursuant to paragraph 4 hereof prior to the Termination Date.

"Fixed Amount" in respect of a Settlement Date means an amount equal to interest on the Notional Principal Amount calculated utilizing the Fixed Interest Rate for the relevant period and shall be equal to $3,112,500.00 in respect of each Settlement Date after August 3, 1984.

"Fixed Interest Rate" shall be a rate of 12.45% per annum based on a 360-day year and twelve 30-day months.

"Interest Period" means each period beginning on a Settlement Date (or, with respect to the first Interest Period, on August 3, 1984) and ending on the day immediately preceding the next Settlement Date.

"Net Termination Amount" has the meaning set forth in paragraph 4 hereof.

"Notional Principal Amount" means $50,000,000.

"Settlement Date" means February 3 and August 3 of each year prior to and including the Termination Date, commencing August 3, 1984, or, if any such day is not a Business Day, the next Business Day.

"Termination Date" means August 2, 1989, or, if such day is not a Business Day, the next Business Day.

"Variable Amount" in respect of a Settlement Date means an amount equal to interest calculated for the Interest Period immediately preceding such Settlement Date on the Notional Principal Amount in accordance with paragraph 2 hereof, utilizing the Variable Interest Rates in effect from time to time during such Interest Period. Interest shall be calculated on the basis of a 360-day year and twelve 30-day months.

"Variable Interest Rate" has the meaning set forth in paragraph 2 hereof.

"Weighted Average Per Annum Discount Rate" means a rate computed by dividing the total discount for a United States Treasury bill auction (total net proceeds subtracted from the full face value at maturity date) by the full face value and multiplying the quotient by 360 days divided by the number of days the Treasury bill is to be outstanding.

2. The Variable Interest Rate shall be equal to the simple average of the Weighted Average Per Annum Discount Rate (expressed on a bond equivalent basis for

a 365 or 366 day year and rounded to three decimal places) of all auctions of direct obligations of the United States having a maturity of ninety-one days ("91-day Treasury bills") occurring between Settlement Dates, as published by the Board of Governors of the Federal Reserve System or as reported by the Department of the Treasury including the results of the auction, if any, which took place on the prior Settlement Date, but excluding the results of the auction occurring on the current Settlement Date. If a 91-day Treasury Bill auction occurs on the first day of the first Interest Period, the results of that auction will be included in the average rate.

3. *Interest Exchange.* (a) On every Settlement Date, Homestead shall determine, and shall certify to Atlantic Federal, the difference between the Fixed Amount ("A") for such Settlement Date and the Variable Amount ("B") for such Settlement Date. If, as so determined, A is less than B, Homestead shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Atlantic Federal at Federal Reserve Board of Miami, Account Number 267083763; and if, as so determined, B is less than A, Atlantic Federal shall on the tenth day after such Settlement Date (or the next Business Day if such day is not a Business Day) pay a sum equal to the difference to Homestead at Manufacturers Hanover Trust Company, Account Number 144096697. If, as so determined, there is no such difference, Homestead shall so certify in writing to Atlantic Federal and the parties will be treated as having performed their relevant obligations for the purposes of this paragraph 3 without any payment having to be made.

(b) Should Homestead fail to deliver the determination referred to in subparagraph 3(a) to Atlantic Federal by the Third Business day after any settlement date,

Atlantic Federal shall make the determination and certify it to Homestead. In that event, the payment required by subparagraph 3(a) still will be due and payable at the time provided in subparagraph 3(a).

(c) All payments under this Agreement shall be made in U.S. dollars in immediately available funds.

4. *Early Termination.* (a) Either Atlantic Federal or Homestead (the "Designator") may designate as the Early Termination Date any Business Day prior to the Termination Date which falls within thirty days after a day on which any of the following events shall have occurred and shall be continuing with respect to the other party (the "Designee"): (i) the Designee has failed to make a payment required under Paragraph 3(a) of this Agreement and has not remedied such default within a period of five Business Days of notice of such default having been received from the Designator; or (ii) the Designee has become insolvent or Bankrupt or admits in writing its inability to pay its debts as they mature, or taken any action for the purpose of entering into a winding-up, dissolution, Bankruptcy, reorganization, or similar proceeding analogous in purpose or effect, or any order has been made by any competent court or any resolution passed for the appointment of a liquidator or trustee in Bankruptcy of the Designee or the Designee has appointed or suffered to be appointed any receiver or trustee of the whole or any material part of its assets or business, or has entered into any composition with its general creditors; or (iii) any indebtedness in respect of borrowed money of the Designee is declared to be due and payable prior to its stated maturity by reason of any default by the Designee in the performance or observance of any obligation or condition, or any such indebtedness of the Designee is not paid when due (after giving effect to any applicable grace period).

(b) Designation of the Early Termination Date shall be accomplished by the Designator giving written notice thereof which notice shall be received by the Designee not less than seven Business Days prior to the date so designated and which shall specify in reasonable detail the basis upon which it is given.

(c) In the event that either Atlantic Federal or Homestead shall serve upon the other a notice pursuant to clause (b) above, the Designator shall:

(i) determine a "discount rate", as of the second Business Day prior to the Early Termination Date equal to the yield to maturity, on a bond equivalent basis, of Treasury Notes issued by the United States Government due on the Termination Date or the maturity date nearest thereto. In the event more than one such Treasury Note issue matures on the Termination Date (or nearest date thereto), the yield on the Treasury Notes which have a market value nearest to par value shall be used.

(ii) calculate a "fixed rate termination amount" equal to the sum of each of (1) the amounts due on each remaining Settlement Date discounted to the Early Termination Date using the rate determined under sub-clause (i) above and (2) the Fixed Amount which is unpaid from the most recent Settlement Date.

(iii) calculate a "variable rate termination amount" equal to the sum of (1) the "Unpaid Variable Amount", (2) the "Interim Variable Amount" and (3) the "Subsequent Variable Amount" such that:

(1) the Unpaid Variable Amount is the amount unpaid from the most recent Settlement Date.

(2) the Interim Variable Amount pertains to the period between the most recent Settlement Date and the next Settlement Date and equals the total of amounts (A) plus (B) such that:

(A) is an amount accrued for the number of days in the period beginning on the most recent Settlement Date and ending on and including the Early Termination Date, ("elapsed days") calculated by dividing 360 into the product of the Variable Interest Rate in effect during such period multiplied by both the Notional Principal Amount and the elapsed days and,

(B) is an amount accrued for the period from the day following the Early Termination Date and ending the day prior to the next Settlement Date calculated by dividing 360 into the product of the Notional Principal Amount multiplied by the remaining days in the period (180 days minus elapsed days) and the discount rate established in sub-clause (i) above and

(3) Subsequent Variable Amount pertains to amounts due on each Settlement Date subsequent to the next Settlement Date and is equal to one-half of the product of the Notional Principal Amount times the discount rate determined in sub-clause (i) above discounted to the Early Termination Date using the discount rate determined under sub-clause (i) above.

(iv) calculate a "Net Termination Amount" which shall be equal to the difference between the amounts computed in sub-clauses (ii) and (iii)

above, and shall be in favor of Homestead if (ii) is greater than (iii) and shall be in favor of Atlantic Federal if (iii) is greater than (ii).

And the Designee shall, without prejudice to any other amounts due or payable hereunder, pay to the Designator not later than two Business Days subsequent to a demand in writing therefor (which demand shall be not earlier than the second Business Day prior to the Early Termination Date) the Net Termination Amount, if the same is in favor of the Designator, it being understood that the Designator shall in no event be obliged to pay the Net Termination Amount, even if the same is in favor of the Designee, to the Designee.

(d) The parties hereto agree that the amounts recoverable by the Designator pursuant to clause (c) of this paragraph 4 are a reasonable pre-estimate of the Designator's loss and are not a penalty; such amounts are payable as liquidated damages to the Designator for the loss of its bargain and the loss of its protection against future risks; and (without prejudice, however, to the rights and remedies of the Designator hereunder in respect of any other breach of this Agreement or as otherwise specifically provided herein) the Designator shall not be entitled to recover any additional damages hereunder as a consequence of such losses; and the parties further agree that a statement in reasonable detail by the Designator showing the calculation of the foregoing amounts shall be conclusive in the absence of manifest error.

5. *Representations and Warranties.* To induce the other party to enter into this Agreement, Atlantic Federal represents and warrants that it is an entity organized and duly existing under the laws of the United States of America, and Homestead represents and warrants that it is an entity organized and duly existing under the laws of

the United States of America, and Atlantic Federal and Homestead each represent, warrant and covenant with respect to itself that: (a) it is duly authorized by all necessary corporate action to execute, deliver and perform this Agreement; (b) the execution, delivery and performance of this Agreement does not conflict with any provisions of the charter or bylaws (or equivalent constituent documents) of such party or of any agreement binding upon it; and (c) none of the events (without regard to any provision requiring the lapse of time or giving of notice or both) specified in clause (a) of paragraph 4 hereof has occurred and is continuing, and it will notify the other party promptly upon it becoming aware of any such event.

6. All payments made hereunder shall be made without any set-off or counterclaim (other than a set-off or counterclaim arising from a default by the other party in the performance of its obligations hereunder).

7. The rights (including without limitation the rights under paragraph 4 hereof) and remedies herein provided are cumulative and not exclusive of any rights and remedies provided by law and shall not affect or impair any right to which any party may be entitled by law.

8. In the event it shall be or become unlawful for either party to perform its obligations hereunder as a result of existing or future laws or regulations then either party may in its sole discretion give notice to the other party specifying such circumstances and declaring the obligations of the parties hereto as provided in this Agreement to be terminated as of the date specified in such notice; *provided, however,* that such termination shall not release either party from its obligations accrued and due hereunder as of the date of such notice. In the event of such termination, the parties' rights and obligations will be determined as outlined in paragraph 4

herein, with the party whose conduct is unlawful being the designee.

9. Any notice to be given hereunder shall be given in writing and shall be deemed to have been given (except as otherwise expressly set forth herein) if given by registered mail four days after posting. Any notice shall be addressed and sent to Atlantic Federal, Attention: James J. Hunter; and to Homestead Attention: John P. Halicky.

10. No failure or delay in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof, or the exercise of any other right, power or privilege.

11. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

12. This Agreement may be executed in counterparts, each of which shall be deemed an original.

13. This Agreement may not be assigned by either party hereto, without the prior written consent of the other party hereto and any purported assignment without such consent shall be void.

14. In the event of any action or proceeding in regard to the subject matter of this contract, the prevailing party shall be entitled to recover its reasonable costs and attorney's fees.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

ATLANTIC FEDERAL SAVINGS
AND LOAN ASSOCIATION

By _____
Title:

HOMESTEAD SAVINGS

By _____
Title:

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY THAT a true and correct copy of the foregoing was served by first class mail this 30th day of September, 1992, upon counsel of record as follows:

EUGENE E. STEARNS, ESQ.
Stearns Weaver Miller Weissler Alhadeff
& Sitterson, P.A.
2200 Museum Tower
150 West Flagler Street
Miami, Florida 33130

JORDEN SCHULTE &
BURCHETTE

By: _____

DESIGNATION OF CORPORATE RELATIONSHIPS

The following is a list of all subsidiaries PaineWebber Incorporated, as well as for any of the corporations listed herein:

AIR TRANSPORT LEASING, INC.
AJ CORPORATION
ATL, INC.
BEDCO LEASING COMPANY, INC.
BEPWI SUB, INC.
BLYTH EASTMAN PAINE WEBBER SERVICING INC.
CAPITAL INVESTMENT & TRUST COMPANY
CHANNELVIEW LEASING COMPANY, INC.
CORRESPONDENCE SERVICES CORPORATION
CT MONROE CORPORATION
DEDICATED PARTNERS INC.
EIGHTH INCOME PROPERTIES, INC.
FIFTH INCOME PROPERTIES, INC.
FIFTH MORTGAGE PARTNERS, INC.
FIRST EQUITY PARTNERS, INC.
FIRST INCOME PROPERTIES FUND, INC.
FIRST INSURED MORTGAGE PARTNERS, INC.
FIRST OPPORTUNITY PARTNERS, INC.
FIRST PW CROW PROPERTIES, INC.
FIRST PW GROWTH PROPERTIES, INC.
FIRST QUALIFIED PROPERTIES, INC.
FOURTH DEVELOPMENT FUND, INC.
FOURTH INCOME PROPERTIES, INC.
FOURTH QUALIFIED PROPERTIES, INC.
GENERAL EQUIPMENT MANAGEMENT, INC.
HARBORSIDE INSURANCE COMPANY HOLDINGS INC.

HARBORVIEW CORPORATION
HOMESTEAD SAVINGS, F.S.B.
KATELLA REALTY CORPORATION
MAIDEN LANE LEASING CORPORATION
MEZZANINE CAPITAL CORPORATION
MITCHELL HUTCHINS ASSET MANAGEMENT INC.
MITCHELL HUTCHINS INSTITUTIONAL INVESTORS, INC.
PAINE HORNELL CORPORATION
PAINE WEBBER AIRCRAFT LEASING INC.
PAINE WEBBER (ASIA) LTD.
PAINE WEBBER BERMUDA LTD.
PAINE WEBBER CHAIRMAN'S INC.
PAINE WEBBER DEVELOPMENT, INC.
PAINE WEBBER FUNDING INC.
PAINE WEBBER FUTURES MANAGEMENT CORPORATION
PAINE WEBBER I. B. HOLDINGS INC.
PAINE WEBBER INCORPORATED OF PUERTO RICO
PAINE WEBBER INTERNATIONAL CAPITAL INC.
PAINE WEBBER LEASING CORPORATION
PAINE WEBBER LONDON HOLDINGS
PAINE WEBBER NIPPON LTD.
PAINE WEBBER PROPERTIES INCORPORATED
PAINE WEBBER REAL ESTATE SECURITIES INC.
PAINE WEBBER REALTY INVESTMENTS INCORPORATED
PAINEWEBBER ADVERTISING ASSOCIATES INC.
PAINEWEBBER AIRCRAFT DEPOSITORY INC.

PAINEWEBBER (B.C.) LIMITED
PAINEWEBBER CAPITAL, INC.
PAINEWEBBER COMMODITIES LIMITED
PAINEWEBBER DEPOSITARY CORPORATION
PAINEWEBBER DIAGNOSTIC, INC.
PAINEWEBBER EMPLOYEE INVESTMENTS MANAGEMENT INC.
PAINEWEBBER FINANCIAL TRADING LIMITED
PAINEWEBBER FRANCE SA
PAINEWEBBER GOLF ADMINISTRATOR, INC.
PAINEWEBBER IBD INC.
PAINEWEBBER INCORPORATED
PAINEWEBBER INTERNATIONAL (ASIA) LTD.
PAINEWEBBER INTERNATIONAL BANK LTD.
PAINEWEBBER INTERNATIONAL BANKING CORPORATION
PAINEWEBBER INTERNATIONAL DEVELOPMENT LTD.
PAINEWEBBER INTERNATIONAL FUTURES (ASIA) LTD.
PAINEWEBBER INTERNATIONAL FUTURES LIMITED
PAINEWEBBER INTERNATIONAL (GREECE) LTD.
PAINEWEBBER INTERNATIONAL INC.
PAINEWEBBER INTERNATIONAL (JAPAN) LTD.
PAINEWEBBER INTERNATIONAL (LONDON) LTD.
PAINEWEBBER INTERNATIONAL OVERSEAS LIMITED
PAINEWEBBER INTERNATIONAL, S.A.

PAINEWEBBER INTERNATIONAL (U.K.) LTD.
PAINEWEBBER INVESTMENTS HOLDINGS INC.
PAINEWEBBER INVESTMENTS INC.
PAINEWEBBER LIFE HOLDINGS INC.
PAINEWEBBER MORTGAGE ACCEPTANCE INC. III
PAINEWEBBER MORTGAGE ACCEPTANCE INC. IV
PAINEWEBBER MORTGAGE FINANCE HOLDING CO.
PAINEWEBBER MORTGAGE FINANCE, INC.
PAINEWEBBER PARTNERS INC.
PAINEWEBBER PROGRAMMED AMORTIZATION TERM SECURITIES INC.
PAINEWEBBER SPECIALISTS INCORPORATED
PAINEWEBBER T.C., INC.
PAINEWEBBER TRADING INC.
PAINEWEBBER UK HOLDINGS
PAINEWEBBER (UK) PENSION TRUSTEES LIMITED
PAINEWEBBER VENTURE MANAGEMENT INC.
PW CAPITOL CORPORATION
PW CHAMPLAIN CORPORATION
PW CLOVER HOLDINGS I, INC.
PW CLOVER HOLDINGS II, INC.
PW CLOVER INC.
PW ENTERTAINMENT INC.
PW FAWCETT CORPORATION
PW FITCHBURG CORPORATION
PW FRANKLIN CORPORATION
PW FREMONT CORPORATION
PW GENEVA CORPORATION

PW HAMILTON CORPORATION
PW IDLEWILD CORPORATION
PW INSURANCE AGENCY
(ARKANSAS) INCORPORATED
PW AGENCY OF PUERTO RICO, INC.
PW INSURANCE AGENCY
(OHIO) INCORPORATED
PW INTERNATIONAL INCORPORATED OF
PUERTO RICO
PW KATELLA CORPORATION
PW LINCOLN HARBOR INC.
PW MAIN CORPORATION
PW McCULLOUGH CORPORATION
PW NORTHWESTERN CORPORATION
PW PARTNERSHIPS
PW PLAZA CORPORATION
PW SHELTER FUND, INC.
PW SPRING MOUNTAIN CORPORATION
PW TREASURY FUNDING INC.
PW TRUST COMPANY
PW WESTVILLE CORPORATION
PWDC HOLDING COMPANY
PWJC INSURANCE SALES (ARIZONA)
INCORPORATED
PWJC INSURANCE SALES INCORPORATED
PQJC INSURANCE SALES
(MASSACHUSETTS) INC.
PWJC INSURANCE SALES (MONTANA) INC,
PWJC INSURANCE SALES (WYOMING) INC.
PWJC INSURANCE SERVICES
(ILLINOIS) INC.
PWJC SALES AGENCY INCORPORATED
PWPR CORPORATION
REALTY SOUTHWEST INVESTMENT
GROUP INC.

REALTY SOUTHWEST INVESTMENT GROUP III INC.
REALTY SOUTHWEST SERVICES INC.
REGIONAL S & L INVESTORS, INC.
RM BRANFORD CORPORATION
RMA INSURANCE CO.
RML LEASING CORPORATION
RMM CORPORATION
RMZ CORPORATION
ROTAN MOSLE ENERGY DEVELOPMENT INC.
ROTAN MOSLE ENERGY INC.
ROTAN MOSLE FINANCIAL CORP.
ROTAN MOSLE INSURANCE AGENCY, INC.
ROTAN MOSLE INVESTMENTS INC.
ROTAN MOSLE INVESTMENT VENTURES INC.
ROTAN MOSLE LEASING COMPANY
ROTAN MOSLE REALTY ADVISORS, INC.
ROTAN MOSLE REALTY ASSOCIATES, INC.
ROTAN MOSLE REALTY INVESTMENTS, INC.
ROTAN MOSLE TECHNOLOGY, INC.
SECOND EQUITY PARTNERS, INC.
SECOND INCOME PROPERTIES, INC.
SECOND PW GROWTH PROPERTIES, INC.
SECOND QUALIFIED PROPERTIES, INC.
SEVENTH INCOME PROPERTIES
SIXTH AVENUE REALTY CORPORATION
SIXTH INCOME PROPERTIES, INC.
THIRD EQUITY PARTNERS, INC.
THIRD INCOME PROPERTIES, INC.
THIRD PW GROWTH PROPERTIES, INC.
THIRD QUALIFIED PROPERTIES, INC.

TRAVEL PLAZA MANAGEMENT, INC.
WALL STREET REALTY CORPORATION
WYODAK CONSTRUCTION CO. INC.

Respectfully submitted,

JORDEN SCHULTE &
BURCHETTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

John H. Schulte
Counsel of Record

Counsel for Petitioner
PaineWebber Incorporated

Supreme Court, U.S.
FILED
OCT 30 1992
OFFICE OF THE CLERK

(3)

No. 92-571

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF IN OPPOSITION

EUGENE E. STEARNS
Counsel of Record
BRADFORD SWING
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
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Miami, FL 33130
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Counsel for Respondent
BankAtlantic

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in this diversity case, the Eleventh Circuit properly affirmed the district court's order and subsequent judgment in favor of BankAtlantic holding that PaineWebber had failed under governing Florida law to state a cause of action in its counterclaim for attorney's fees and costs pursuant to an alleged indemnification agreement.

PARTIES TO THE PROCEEDING

Petitioner is PaineWebber, Incorporated, f/k/a Blyth Eastman Paine Webber Incorporated.

Respondent is BankAtlantic Savings Bank, a Federal Savings Bank, f/k/a Atlantic Federal Savings and Loan Association of Ft. Lauderdale.

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent's parent corporation is BFC Financial Corporation, f/k/a BankAtlantic Financial Corporation, f/k/a I.R.S. Financial Corporation. The entities affiliated with the parent are:

2000 South Dixie Corp.
B. & N. General Corp.
B.K. General Corporation
B.K.S. General Corporation
B.W. General Corporation
Chicago Heights General Corp.
Eden Services, Inc.
Eden United, Inc.
First Pensacola Mortgage Company, Inc.
Florida Partners Corporation
H.D. General Corporation
H.K. General Corporation
I.R.E. Advisors, Corp.
I.R.E. Advisors Series 21, Corp.
I.R.E. Advisors Series 23, Corp.
I.R.E. Advisors Series 24, Corp.
I.R.E. Advisors Series 25, Corp.
I.R.E. Advisors Series 26, Corp.
I.R.E. Advisors Series 27, Corp.
I.R.E. Advisors Series 28, Corp.
I.R.E. Advisors Series 29, Corp.
I.R.E. BMOC, Inc.
I.R.E. Commercial Properties, Inc.
I.R.E. Computer Resources, Inc.

I.R.E. Condominium Management, Inc.
I.R.E. Energy 1981, Inc.
I.R.E. First Florida, Inc.
I.R.E. Growth Fund, Ltd.-Series 29
I.R.E. Income Advisors Corp.
I.R.E. Investments, Inc.
I.R.E. Konica, Inc.
I.R.E. Leasing, Inc.
I.R.E. Lennar, Inc.
I.R.E. North River, Inc.
I.R.E. Pension Advisors Corp.
I.R.E. Pension Advisors-II Corp.
I.R.E. Pension Investors, Ltd.
I.R.E. Pension Investors, Ltd.-II
I.R.E. Pinebrook, Inc.
I.R.E. Professional, Inc.
I.R.E. Properties, Inc.
I.R.E. Property Analysts, Inc.
I.R.E. Property Management, Inc.
I.R.E. Real Estate Corporation (THE)
I.R.E. Real Estate Fund, Ltd.-Series 21
I.R.E. Real Estate Fund, Ltd.-Series 23
I.R.E. Real Estate Fund, Ltd.-Series 24
I.R.E. Real Estate Fund, Ltd.-Series 25
I.R.E. Real Estate Fund, Ltd.-Series 26
I.R.E. Real Estate Fund, Ltd-Series 27
I.R.E. Real Estate Funds, Inc.
I.R.E. Real Estate Growth Fund, Ltd.-Series 28
I.R.E. Real Estate Income Fund, Ltd.
I.R.E. Real Estate Investment, Series 2, Inc.
I.R.E. Real Estate Investments, Inc.
I.R.E. Realty Advisory Group, Inc.
I.R.E. Shopping Center Development
I.R.E. Texas, Inc.
I.R.E. Wren Park, Inc.
Investors Sheltered Securities, Inc.
N.C. & G. General Corporation
North Miami General Corp.

Pengro Associates, Inc.
Professional Data Corporation
Realty 2000 Corporation
Rushmore Realty, Inc.
S & P General Corp.
S.T. General Corporation
Saxon S.L. General Corporation
Saxon S.W. General Corporation
Southern National General Corporation
Tanglewood College Station, Inc.
Tigertail General Corporation
Toy Associates, Inc.
Toy General Corporation
Travis House Apartments, Inc.
U.S. Capital Corp.
U.S. Capital Securities, Inc.
W.P. General Corporation
Z.W. General Corp.

Entities affiliated with the respondent are:

Atlantic Investment 68 Avenue Corp.
Atlantic Investment Broward Boulevard Corporation
Atlantic Investment Clifton Corp.
Atlantic Investment Commercial, Inc.
Atlantic Investment Cypress Lane Corp.
Atlantic Investment Jacaranda Corp.
Atlantic Investment Pelican Point Corp.
Atlantic Investment Pines Point Corporation
Atlantic Investment Taft Street Corp.
BankAtlantic Development Corporation
BankAtlantic Leasing
Fidelity Service Corporation
Hammock Homes, Incorporated
Heartwood 1, Inc.
Heartwood 2, Inc.
Heartwood 3, Inc.
Heartwood 4, Inc.
Heartwood 5, Inc.

Heartwood 6, Inc.
Heartwood 7, Inc.
Heartwood 8, Inc.
Heartwood 9, Inc.
Heartwood 10, Inc.
Heartwood 11, Inc.
Heartwood 12, Inc.
Heartwood 13, Inc.
Heartwood 14, Inc.
Heartwood 15, Inc.
Heartwood 16, Inc.
Heartwood 17, Inc.
Heartwood 18, Inc.
Heartwood 19, Inc.
Heartwood 20, Inc.
Heartwood 87 Incorporated
Heartwood 88 Incorporated
Heartwood 90 Incorporated
Heartwood 91 Incorporated
Heartwood 91-1 Incorporated
Heartwood 91-2 Incorporated
Heartwood 91-3 Incorporated
Heartwood 91-4 Incorporated
Heartwood-Promenade Incorporated
Professional Valuation Services, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-571

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF IN OPPOSITION

Respondent, BankAtlantic Savings Bank ("BankAtlantic"), requests that the petition for writ of certiorari be denied. The judgment entered by the district court against PaineWebber on its counterclaim for attorney's fees and costs pursuant to an alleged indemnification agreement was based solely upon PaineWebber's failure to state a cause of action according to the express terms of the agreement itself and the controlling law of Florida in this diversity action. Despite PaineWebber's tortured attempt to manufacture two issues, none of the special and important reasons for granting a writ as suggested in Rule 10 of this Court is even remotely involved in

either the entry or subsequent review of the judgment against PaineWebber on its counterclaim.

OPINIONS BELOW

Omitted from the listing in PaineWebber's petition is the Final Judgment dated January 20, 1990. A copy of the judgment was included in the appendix at A-34.

STATEMENT OF THE CASE

At its heart, and from the very beginning, this has been a case about PaineWebber's omissions, misrepresentations, and conduct lacking in fundamental honesty and integrity. The behavior of PaineWebber toward BankAtlantic prior to and during this litigation and the behavior of PaineWebber toward the jury, the district court, and the Eleventh Circuit has consistently been marked by this fundamental lack of honesty.[1]

PaineWebber now seeks to extend its fraudulent and deceptive behavior toward this Court in a contrived attempt to obtain review. Contrary to PaineWebber's assertions, entry of judgment on the counterclaim has little or nothing to do with federal law or the administration of the federal courts. As the district court's own order states on its face, the judgment was based on the language of the indemnification agreement itself and well-established principles of Florida law. A-51-52. PaineWebber is desperate to establish some basis for recovery of attorney's fees to offset the $350,079.80 in fees and costs it must pay to BankAtlantic as a Rule 11 sanction imposed in this case.[2]

---

[1] An aspect of this—intentionally orchestrated attorney and juror misconduct—is raised in BankAtlantic's cross-petition.

[2] The appeal of this sanction by PaineWebber and its prior attorneys is still in the briefing stage before the Eleventh Circuit. PaineWebber's other attempt to obtain offsetting attorney's fees (a Rule 11 motion against BankAtlantic) has already been rejected by both the district court and the Eleventh Circuit.

Even if PaineWebber's "questions" did raise important issues, which, of course, they do not, PaineWebber has, nonetheless, misrepresented to this Court the fundamental factual bases upon which both of those "questions" are based. Despite PaineWebber's assertion to the contrary, the facts mentioned by the Eleventh Circuit in its opinion *were* before the district court at the time it decided to grant the judgment on the counterclaim (Question 1). R11-341-3; R23-498-3. In addition, the "economic loss rule" never had anything to do with the judgment on the counterclaim in either the district court or the Eleventh Circuit (Question 2). A-26-29, 34, 37, 51-52.

A. Initial Pleadings, Discovery, And A Rule 11 Sanction.

BankAtlantic sued PaineWebber for breach of fiduciary duty, fraud, constructive fraud, fraudulent concealment, misrepresentation, and negligence. A-93-100. The essence of the tort claims was that PaineWebber had a fiduciary relationship with BankAtlantic, that PaineWebber abused the fiduciary relationship by misrepresentations and omissions to induce BankAtlantic into entering into and staying in two interest rate swaps that caused BankAtlantic to wire transfer $24 million to another PaineWebber client in Califonria (Homestead Savings), that the two swap transactions recommended by PaineWebber (which caused BankAtlantic to lose all $24 million in cash and another $6 million of interest) made no sense for BankAtlantic looking at its business as a whole, and that the PaineWebber employees who recommended the swaps lied about their expertise (admitting at trial that they had none), lied about the supposed benefits of the transactions, and concealed most of the information they had about their extensive and highly profitable relationship with Homestead, about the problems at Homestead, and about the huge and difficult to understand risks of these particular interest rate swap transactions.[3]

---

[3] The transactions involved in this case were very complicated. The interest rate swap agreements were, as structured by Paine

BankAtlantic also sued PaineWebber for breach of contract. A-100-101. The essence of the contract claim was that PaineWebber completely failed to provide any services whatsoever under a financial advisor agreement causing BankAtlantic to lose the amount of the fees it had paid to PaineWebber. Considering the relative insignificance of this claim as compared to the losses caused by the swap transactions, the breach of contract claim was dropped during trial.[4]

In its responses to these claims—before, during, and after trial (until its brief to the Eleventh Circuit)—PaineWebber consistently took the position "that the financial advisor agreement *did not* cover the swaps." R38-711-9 (emphasis in the original). As PaineWebber told the trial court in a written memorandum regarding its affirmative defenses to the tort claims filed long *before* trial: "It is important to distinguish that the damages which BankAtlantic now claims result solely from the swaps, not from any alleged breach of this Financial Advisory Agreement. *The interest rate swaps were* [*an*]

Webber, merely part of a larger "dynamic hedge" against adjustable rate mortgages designed to extend over a period of seven years. Not only honesty but also highly specialized expertise (both of which PaineWebber falsely represented that it had) is required to determine if such transactions are appropriate for any particular institution and, if so, to properly effectuate them. The same honesty and expertise is then required to manage the situation over the life of the swaps. As even PaineWebber's own expert stated, this is "tricky" business.

[4] PaineWebber suggests that after it was terminated for nonperformance, a "corporate raider" gained control of BankAtlantic and decided to sue PaineWebber for revenge. This is merely the most genteel assertion of PaineWebber's totally false and vicious personal attack on BankAtlantic's chairman at trial. In fact, BankAtlantic's chairman had never before taken control of an existing company, instead building all of his own businesses from scratch. PaineWebber's personal attack on the chairman was a ruse to divert attention from its horrendous—but very complicated and thus difficult to understand—wrongdoing.

entirely separate and unrelated transaction." R11-341-3 (emphasis added). And as PaineWebber itself further noted, BankAtlantic considered the primary significance of the financial advisory agreement to this case to be an "enhance[ment of] the standard of care owned by [PaineWebber] with respect to the interest rate swap transactions to one of a fiduciary duty." *Id.*

With the issues thus framed, the case proceeded in a rather uneventful manner. Extensive discovery was conducted on BankAtlantic claims and all the issues in the case for nearly two years after this action was commenced in August of 1987. Trial was specially set for June 19, 1989.

Then, on the eve of trial, BankAtlantic learned through independent investigation that PaineWebber and its counsel had intentionally defied discovery rules and violated a district court discovery order by concealing a substantial body of documents evidencing PaineWebber's breach of fiduciary duty to BankAtlantic. Those documents related to the relationship between PaineWebber and Homestead, the swap partner with which PaineWebber had matched BankAtlantic in the very costly, and totally inappropriate, interest rate swap transactions. BankAtlantic moved for sanctions under Rule 11.

On July 10, 1989, the district judge entered a lengthy "Memorandum Order" outlining the violations. *BankAtlantic v. Blyth Eastman PaineWebber, Inc.*, 127 F.R.D. 224 (S.D. Fla. 1989). The trial judge stated: "In short, [PaineWebber] did its utmost to keep [BankAtlantic] in the dark, and the truth hidden." *Id.* at 233. The judge expressly ruled that after trial, he would award attorney's fees and costs to BankAtlantic as sanctions against PaineWebber and its counsel. *Id.* at 235-36.

B. PaineWebber's Counterclaim.

Immediately after the sanction order was entered, new counsel appeared in the case for PaineWebber, and the prior counsel was ultimately removed. The trial was con-

tinued until October. During this continuance caused by its own wrongdoing, PaineWebber took advantage of the opportunity and filed the counterclaim featured in its petition before this Court. A-66-82.

The counterclaim alleged a right to recover from BankAtlantic the fees and costs PaineWebber was incurring in this suit based on an indemnification theory. The alleged factual basis for the claimed indemnification was a letter attached as Exhibit B to the counterclaim. A-78-82.

Contrary to the general allegations of PaineWebber's counterclaim, however, the first and third paragraphs of the indemnification letter specifically state on their face that indemnification is for actions related to or arising out of the financial advisor agreement, which bears the same date as the indemnification agreement. A72, 78-80. The indemnification agreement is, therefore, by its own terms, collateral to, and co-extensive with, the financial advisor agreement, which PaineWebber has repeatedly said to be unrelated to the swaps.

Moreover, the letter does not anywhere explicitly state that PaineWebber would be released for its own negligence as against any claims by BankAtlantic. Instead, the letter contains only general indemnification and notice provisions showing a clear intent on the fact of the letter that indemnification applies solely to claims by third parties against PaineWebber. A-78-82. BankAtlantic, therefore, promptly moved for judgment on the pleadings based upon Florida contract and indemnification law principles. R28-562.

C. Judgment On The Counterclaim.

PaineWebber responded to BankAtlantic's motion by also moving for judgment on the pleadings as to its counterclaim as well as for summary judgment on the misrepresentation and negligence counts of the amended complaint based upon the indemnification agreement. The

district court determined, therefore, that the counterclaim could be decided as a matter of Florida law. A-51.

The district court clearly stated its rationale for the judgment against PaineWebber:

> The ordinary purpose of an indemnification agreement between two parties is to shift liability for claims asserted by third parties. Defendant contends, however, that Plaintiff has agreed to indemnify Defendant against claims held by Plaintiff against Defendant. In essence, then, Defendant has read the indemnification agreement as a *release* of claims that Plaintiff might otherwise assert against Defendant.
>
> The indemnity provision does not support Defendant's position because the provision does not speak in terms of a release of liability. The lead sentence of the indemnity provision states, "Since BEPW will be acting on behalf of the Association [BankAtlantic], the Association agrees that it will indemnify and hold harmless BEPW . . . ." Similarly, the indemnity provision requires Defendant to give notice to Plaintiff of receipt of claims covered by the agreement. Plainly, the parties intended to shift liability from Defendant to Plaintiff for certain third party claims resulting from Defendant's agency relationship with Plaintiff.

A-51-52 (emphasis in original). This rationale is in complete harmony with the express terms of the indemnification agreement and with Florida law on contract interpretation in general and exculpatory clauses in particular.

Based upon this rationale, the district court granted BankAtlantic's motion for judgment on the pleadings and denied PaineWebber's cross motions. A-52. Rehearing was denied, and final judgment on the counterclaim was entered. A-34, 37.

D. Affirmance By The Eleventh Circuit.

In its initial brief on appeal to the Eleventh Circuit, BankAtlantic demonstrated in detail that it had been

established without dispute at trial that PaineWebber had breached a fiduciary duty to BankAtlantic causing $30 million in damages.[5] BankAtlantic explained that the financial advisor agreement was part of the evidence that PaineWebber stood in a fiduciary relationship to BankAtlantic, but BankAtlantic did not argue, as asserted by PaineWebber in its petition, that all of the claims against PaineWebber "arose out of and were dependent on the financial advisor agreement." Petition at 5. Indeed, *prior* to trial PaineWebber had itself specifically acknowledged that the swaps were not part of the advisor agreement and that BankAtlantic had alleged the existence of the agreement merely to "enhance the standard of care by [PaineWebber] with respect to the interest rate swap transactions to one of a fiduciary duty." R11-341-3.

BankAtlantic's initial brief also demonstrated that this case was not tried to an impartial jury nor was it tried on the merits. The foreman of the jury had concealed that he was employed by a law school classmate of one of PaineWebber's trial counsel and that he had read, in violation of an express court order, on the day of closing arguments and jury deliberation, a highly prejudicial and inaccurate article containing adverse assertions about BankAtlantic and its chairman, an article that the juror

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[5] PaineWebber's assertion on page 21 of its petition that "BankAtlantic's officers admitted at trial that BankAtlantic had not suffered any loss or damage" is characteristic of PaineWebber's crass deception throughout this case. In fact, there was testimony from only one witness, a former officer who had been fired by BankAtlantic for incompetence. His testimony was a distorted manipulation of the complicated "expensing" accounting principles employed by BankAtlantic to recognize on the bank's financial statements the swap losses as they were actually paid over the term of the swaps rather than all at once on a "mark to market" basis. Even that former officer, upon cross examination, admitted that millions of dollars actually flowed from the company as a direct result of the swaps and that the critical issue was whether the swaps should have been put on in the first place.

had been given at his employer's office.[6] Moreover, PaineWebber's trial counsel had viciously and personally attacked BankAtlantic's chairman throughout the trial, but especially in closing, in a manner very similar to that contained in the article read by the jury foreman. It is not surprising under the circumstances that the jury returned a verdict in favor of PaineWebber.

In its answer brief to the Eleventh Circuit, PaineWebber almost completely ignored the fiduciary duty, juror misconduct, and attorney misconduct issues raised by BankAtlantic. Instead, PaineWebber primarily argued, in a direct reversal of all its previous assertions to the district court,[7] that the financial advisor agreement covered the swap transactions and that, as a result, all of BankAtlantic's claims were barred by Florida's "economic loss rule." Based upon this argument, PaineWebber sought affirmance of the judgment in its favor on the amended complaint.

Building upon the false premise that the financial advisor agreement covered the swap transactions, PaineWebber also argued to the Eleventh Circuit on cross appeal that the indemnification agreement accompanying the financial advisor agreement applied to this case and that, contrary to the express language of the agreement itself, PaineWebber was entitled to indemnification for claims by BankAtlantic as well as for claims by third parties. Based upon this argument, PaineWebber sought reversal of the judgment against it on the counterclaim.

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[6] This is the same juror who PaineWebber quotes on page 21 of its petition as "exclaiming that the action was 'frivolous' and that they 'were sorry to see the case in court.'" Contrary to PaineWebber's assertion here, it was only this one juror who made that comment to the press at the conclusion of the trial, and he did so only seconds after talking with counsel for PaineWebber.

[7] On page 6 of its petition, PaineWebber asserts that it was BankAtlantic who changed position on this issue. PaineWebber has a curious tendency to accuse others of the very wrongdoing in which it is engaging.

BankAtlantic's reply brief to PaineWebber's cross appeal on the counterclaim demonstrated in detail that (1) the interest rate swap transactions were not within the scope of the indemnification agreement, (2) the express language of the indemnification agreement applies only to third parties and does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as unquestionably required by Florida law, and (3) the agreement does not, and no agreement can as a matter of public policy in Florida, indemnify for claims of wilful misconduct and gross negligence such as breach of fiduciary duty and fraud.

In the portion of its opinion focusing on the counterclaim, the Eleventh Circuit in essence accepted BankAtlantic's position by agreeing with the district court's interpretation of the indemnification agreement. A-26-28. The Eleventh Circuit also explained "as PaineWebber has contended *throughout* this litigation," that the swaps were not within the scope of the financial advisor agreement and, thus, not within the scope of the indemnification agreement. A-28-29 (emphasis added).

Although agreeing with the district court's interpretation of the indemnification agreement, the Eleventh Circuit did base its affirmance of the judgment against PaineWebber on the latter ground. The Eleventh Circuit correctly observed that "throughout this litigation" and "[u]ntil now, PaineWebber has argued that the interest rate swaps were outside of the contract." A-26, 28. For whatever reason, however, the essential holding of the Eleventh Circuit was that "the district court did not err in dismissing PaineWebber's counterclaim." A-29.

SUMMARY OF ARGUMENT

Contrary to PaineWebber's assertion, the material upon which the Eleventh Circuit relied for its affirmance of the decision against PaineWebber on its counterclaim *was* of record at the time of the trial court's order. Even if the material had not in fact been filed as of record prior to the district court's disposing of the counterclaim, both the final judgment and the Eleventh Circuit's affirmance are nonetheless correct as a matter of law.

The indemnification agreement facially establishes that it applies only to third parties. Moreover, the agreement does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as required by Florida law. *See, e.g., Wenzel v. Boyles Galvanizing Co.*, 920 F.2d 778, 781 (11th Cir. 1991). In addition, PaineWebber could not have exculpated itself for the breach of fiduciary duty, fraud, constructive fraud, and fraudulent concealment claims by BankAtlantic even if it had attempted to do so in the indemnification agreement. *See e.g., Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. 5th DCA 1985).

The economic loss rule has absolutely no bearing whatsoever on either court's decision about PaineWebber's counterclaim. In any event, the economic loss rule does not apply in this case even if the swaps were within the scope of the financial advisor agreement because there is an express exception to the rule, applicable here, for "independent torts." *See, e.g., Kee v. National Reserve Life Insurance Company*, 918 F.2d 1538, 1543 (11th Cir. 1990).

PaineWebber's entire argument about alternative dispute resolution does not have anything to do with affirmance of the district court's judgment against PaineWebber and is merely a diversion from the basic fact that PaineWebber had no release or indemnification covering claims of wrongdoing to BankAtlantic relating to the swaps.

ARGUMENT

I. THE MATERIAL UPON WHICH THE ELEVENTH CIRCUIT RELIED WAS OF RECORD AT THE TIME OF THE TRIAL COURT'S ORDER.

The most direct and simple response to PaineWebber's first reason for granting the writ is that, contrary to PaineWebber's assertion, the material upon which the Eleventh Circuit relied *was* of record at the time of the trial court's order.

Nine months *before* the district court's order disposing of the counterclaim, PaineWebber filed a memorandum regarding its affirmative defenses in the case and stated:

> It is important to distinguish that the damages which BankAtlantic now claims result solely from the swaps, not from any alleged breach of this Financial Advisory Agreement. *The interest rate swaps were [an] entirely separate and unrelated transaction.*

R11-341-3 (emphasis added). Then one month *before* the district court's order, PaineWebber filed a motion stating: "PaineWebber denies that the March 20, 1984 contract [the financial advisor agreement] is related to the sale of the interest rate swaps." R23-498-3.

Even after the district court's order, PaineWebber repeated the position in its memorandum in opposition to BankAtlantic's motion for judgment n.o.v. or new trial:

> The evidence amply demonstrated that the swaps were agreed to, or entered into, independent of any alleged financial advisor agreement.

and

> [T]he evidence at trial established that the [financial advisor] agreement did not cover interest rate swaps. . . . Thus, even had the jury concluded that the swaps were entered into while the financial advisor agreement was effective, *the evidence established that the agreement did not encompass the swaps.*

R38-711-7, 9 (emphasis added).

It was not until the post-trial motions had been denied and PaineWebber was safely clear of the district court judge who had handled the case from the beginning did it suddenly reverse its position. Only then did PaineWebber argue that the swaps *were* included within the scope of the financial advisor, and, thus, of the indemnification, agreements. The Eleventh Circuit was obviously correct in observing that "[u]ntil now, PaineWebber has argued that the interest rate swaps were outside of the contract." A-26.

Even if the documents establishing PaineWebber's position had not in fact been filed as of record prior to the district court's order disposing of the counterclaim, both the final judgment and the Eleventh Circuit's affirmance are nonetheless correct as a matter of law. The indemnification agreement, which was attached as an exhibit to, and expressly incorporated by reference into, the counterclaim, facially establishes that it applies only to third parties and does not anywhere specifically state that it indemnifies, releases, or exculpates PaineWebber from claims for its own negligent conduct as required by Florida law. A-69, 78-82.

Both the district court and the Eleventh Circuit cite *Gibbs v. Air Canada*, 810 F.2d 1529, 1532 (11th Cir. 1987) for the proposition that "[u]nder Florida law, construction of a contract of indemnity generally is a question of law for the court applying recognized rules of contract interpretation." A-26, 51. Independently applying those principles, both courts reached the same conclusion: "the plain language of the agreement indicates that the parties intended to indemnify PaineWebber solely against third party claims resulting from PaineWebber's agency relationship with BankAtlantic." A-28, 52.

In addition, the district court recognized (as fully argued by BankAtlantic in its memorandum to the court) that the indemnification agreement does not act as a re-

lease, or an exculpation from, liability because it does not speak in such terms. The Eleventh Circuit itself has noted in another case:

> Florida law is clear on the requirements for an effective exculpatory clause. Exculpatory clauses are not favored and are effective only if the clause "clearly state[s] that it releases the party from liability for his own *negligence*." *Goyings v. Jack & Ruth Eckerd Foundation*, 403 So.2d 1144, 1146 (Fla. Dist.Ct.App. 1981) (emphasis added). A clause simply disclaiming liability in general terms is insufficient to exculpate a party from its own negligence.

Wenzel v. Boyles Galvanizing Co., 920 F.2d 778, 781 (11th Cir. 1991); *see Gibbs*, *supra*, 810 F.2d at 1536.

This principle has been established in Florida law for a long time. *University Plaza Shopping Center, Inc. v. Stewart*, 272 So.2d 507 (Fla. 1973); *Charles Poe Masonry, Inc. v. Spring Lock Scaffolding Rental Equipment Company*, 374 So.2d 487 (Fla. 1979); *Levine v. A. Madley Corporation*, 516 So.2d 1101 (Fla. 1st DCA 1987).

The law in Florida is also clearly established that any attempt in an agreement to exculpate oneself for an intentional tort, wilfulness, and gross negligence is against public policy and will not be enforced. *E.g.*, *Kellums v. Freight Sales Centers, Inc.*, 467 So.2d 816 (Fla. 5th DCA 1985). PaineWebber, therefore, could not have exculpated itself for the breach of fiduciary duty, fraud, constructive fraud, and fraudulent concealment claims by BankAtlantic even if it had attempted to do so in the indemnification agreement.

Quite clearly, PaineWebber's first reason for allowing the writ is without merit. Indeed, it is frivolous.

II. THE ECONOMIC LOSS RULE IS IRRELEVANT TO THE COUNTERCLAIM.

PaineWebber's second reason for allowing the writ is more frivolous than the first. Even a cursory reading of the district court's order and the Eleventh Circuit's

opinion shows that the economic loss rule has absolutely no bearing whatsoever on either court's decision about PaineWebber's counterclaim. A-26-29, 51-52.

PaineWebber's argument about the economic loss rule was advanced below as a grounds for affirming the judgment against BankAtlantic on the jury verdict. It was directed solely toward BankAtlantic's tort claims. It does not as a matter of law have anything to do with the indemnification issue raised by PaineWebber's counterclaim. The Eleventh Circuit simply did not affirm "the judgment in favor of BankAtlantic on PaineWebber's counterclaim by holding that BankAtlantic could sue in tort for economic damages flowing from an alleged contractual breach" as asserted by PaineWebber on page 11 of its petition.[8]

A. Economic loss rule not applicable to this case.

In any event, the economic loss rule does not apply in this case even if the swaps were within the scope of the financial advisor agreement. As demonstrated to both the district court and the Eleventh Circuit, there is an express exception to the rule applicable here, for "independent torts." The Eleventh Circuit, in a discussion of Florida law, has clearly recognized this exception:

> [T]he mere existence of a contract claim does not automatically vitiate all causes of action in tort. Tort claims can be appropriate under Florida law where there is some wrongful conduct which amounts to an independent tort in addition to the conduct resulting in the contractual breach.

Kee v. National Reserve Life Insurance Company, 918 F.2d 1538, 1543 (11th Cir. 1990).

---

[8] The only link between the economic loss rule and PaineWebber's counterclaim for indemnification is that both rest on an erroneous premise that interest rate swap transactions are within the scope of the financial advisor agreement and the indemnification agreement. *Compare* A-25 *with* A-28.

The issue, as further explained by another Eleventh Circuit opinion, is precisely what is required to prove a separate and independent tort ("whether the plaintiff need merely show that the same actions which resulted in a contractual breach also fulfilled the elements of a tort claim or whether the plaintiff must establish additional behavior by the defendant beyond that which breached the contract that supports a tort claim"). *Interstate Securities Corp. v. Hayes Corp.*, 920 F.2d 769, 776 n.11 (11th Cir. 1991). *See additionally, Boyd v. Oriole Homes Corp.*, 515 So.2d 300 (Fla. 4th DCA 1987), *cert. dismissed sub nom. Oriole Homes Corp. v. Boyd*, 525 So.2d 879 (Fla. 1988); *Aero International Corp. v. Florida National Bank of Miami*, 437 So.2d 156 (Fla. 3d DCA 1983), *pet. for rev. denied*, 449 So.2d 264 (Fla. 1984); *Senfeld v. Bank of Nova Scotia Trust Company (Cayman), Ltd.*, 450 So.2d 1157 (Fla. 3d DCA 1984).

The legal issue may best be seen in common sense terms. If a security guard under contract to the bank fails to appear for work and the vault is robbed, that is a breach of contract. If, however, the guard does not show up for work so that a thief can get into the vault, in exchange for which the guard is given a part of the take, that is a tort. In terms of the Eleventh Circuit's language in *Interstate Securities*, there was "additional behavior by the defendant" in the latter situation.

In this case, there was such "additional behavior." PaineWebber abused its fiduciary relationship with BankAtlantic, using fraudulent omissions and misrepresentations, to induce BankAtlantic to enter into interest rate swap transactions so that PaineWebber could help maintain the flow of commission money to itself from Homestead totalling over $7 million in a sixteen month period alone. R33-36, 102-103; R60-88-92. PaineWebber's undisclosed conflict of interest and gross abuse of its fiduciary relationship with BankAtlantic is akin to the guard

not showing up for work so that the thief can get into the vault and give the guard a part of the take.

Totally apart from the fact that the swaps are not within the scope of the financial advisor agreement, there is, therefore, "wrongful conduct which amounts to an independent tort." The economic loss rule has no application in this case.

B. No conflict with national policy.

PaineWebber argues that an adverse judgment on its counterclaim (because of an alleged failure to apply the economic loss rule) runs contrary to "national policy which fosters alternative dispute resolution." That is ludicrous.

Like PaineWebber's personal attack on the chairman of BankAtlantic at trial to divert attention from its gross breaches of fiduciary duty, PaineWebber's entire argument about alternative dispute resolution is a diversion from the basic fact that PaineWebber had no release or indemnification covering claims of wrongdoing to BankAtlantic relating to the swaps. Granted, a rational discussion about alternatives to litigation would be far more interesting than performing an analysis of a specific commercial agreement to determine that a release or indemnification has not been provided in light of Florida's law on exculpatory clauses. Such a discussion, however, is completely irrelevant to the issues.

Affirmance of the district court's judgment against PaineWebber does not have anything to do with any policy regarding alternative dispute resolution. Nor does it conflict with decisions of other courts of appeal, involve federal questions, depart from the accepted and usual course of judicial proceedings, call for an exercise of this Court's power of supervision, or otherwise raise special and important reasons for grant of writ of certiorari.

CONCLUSION

PaineWebber's petition for writ of certiorari should be denied. This Court should consider an award of damages to BankAtlantic as provided in Rule 42.2 of this Court.

Respectfully submitted,

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in the Supreme Court of the United States

OCTOBER TERM, 1992

PAINEWEBBER INCORPORATED,
Petitioner,

v.

BANKATLANTIC,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

Introduction

BankAtlantic's brief in opposition is largely an attack against counsel, the district judge, the court, the jurors, and the Eleventh Circuit. BankAtlantic fails to dispute the central fact compelling review by certiorari — the Eleventh Circuit affirmed the district court's judgment on the pleadings by relying on matters outside the pleadings, i.e., PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v. The Eleventh circuit's decision thus conflicts with the majority of circuits, which hold that appellate review of a pretrial disposition is limited to those matters before the district court at the time of its ruling.

Additionally, the Eleventh Circuit's opinion recedes from the economic loss rule by permitting the assertion of tort claims, despite the limitation on remedies negotiated by BankAtlantic and PaineWebber in their contract. In so doing, the decision conflicts with the public policy considerations that this Court announced in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), and adopted by the Florida Supreme Court in *AFM Corp v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180 (Fla. 1987). Both *East River* and *AFM* hold that contract law, rather than tort law, is better suited to the resolution of commercial controversies. *Id.* at 872-73.

BankAtlantic's attempts to diminish the precedential significance of the Eleventh Circuit's opinion by twisting its holding and re-arguing matters relating solely to its unsuccessful case-in-chief. The Eleventh Circuit's holding with respect to PaineWebber's counterclaim creates a conflict that this Court should resolve by issuing a writ of certiorari.

I. THE DECISION CONFLICTS WITH THOSE OF THE MAJORITY OF CIRCUITS

The Eleventh Circuit's holding that it could affirm a pretrial dismissal based upon material that was not of record at the time of the district court's order conflicts with the opinions of the majority of circuits and is contrary to the opinions of this Court.[1] The holding — as precedent — creates the conflict that this Court should resolve.

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[1] *See, e.g.*, Skotak v. Tenneco Resins, Inc., 935 F.2d 909, 915-16 (5th Cir. 1991) (court of appeals may not consider evidence or arguments not presented to district court for district court's consideration in ruling on the motion), *cert. denied*, 113 S. Ct. 98 (1992); Catrett v. Johns-Manville Sales Corp., 826 F.2d 33, 37 (D.C. Cir. 1987) ("Our sole and limited task is to assess with care the record before the District Court at the time it granted Celotex's summary judgment motion and to determine whether that ruling was proper in light of the state of the record at that juncture"), *cert. denied*, 484 U.S. 1066 (1988); Glaros v. H.H. Robertson Co., 797 F.2d 1564, 1568-69 (Fed. Cir. 1986) ("To

A majority of the circuits hold that appellate review of pretrial dispositions must be limited to materials before the district court at the time of its ruling. The judgment entered with respect to PaineWebber's indemnity counterclaim was a judgment on the pleadings entered pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The rule specifically limits the entry of any such judgment to matters in the pleadings, which must be accepted as true. *United States v. Gaubert,* 111 S. Ct. 1267, 1276 (1991); *Hischon v. King & Spaulding,* 467 U.S. 69, 73 (1984); *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

BankAtlantic opposes the writ of certiorari by arguing that PaineWebber's memoranda of law regarding its affirmative defenses and in support of its motion for summary judgment were before the district court at the time it entered its judgment on the pleadings against PaineWebber on its counterclaim. BankAtlantic's argument diverts the Court from the central, undisputed fact — that there was nothing of record to support the Eleventh Circuit's holding that BankAtlantic's *claims* (i.e., *complaint*) were outside the scope of the Financial Advisor Agreement. In affirming the judgment on the pleadings, the Eleventh Circuit ex-

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succeed on appeal, [appellant] must show that he did submit such evidence *before* summary judgment was granted"), *cert. dismissed,* 479 U.S. 1072 (1987); Voutour v. Vitale, 761 F.2d 812, 817 (1st Cir. 1985) ("Our review is confined to an examination of the materials before the court at the time the rulings were made. Neither the evidence offered subsequently at the trial nor the verdict is relevant."), *cert. denied,* 474 U.S. 1100 (1986); Dictograph Prods. Co. v. Sonotone Corp., 231 F.2d 867, 867-68 (2d Cir.) (appellate court has no "jurisdiction" to consider depositions or other evidence not filed in the district court when the motion was decided), *cert. dismissed,* 352 U.S. 883 (1956); Harkins Amusement Enters., Inc. v. General Cinema Corp., 850 F.2d 477, 482 (9th Cir. 1988) ("the relevant record on review of summary judgments is the record as it existed at the time the motion was considered); *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 n.16 (1970) (statement "not in the record of the proceedings below and therefore could not have been considered by the trial court. Manifestly, it cannot be properly considered by us in the disposition of the case").

pressly relied on PaineWebber's post-trial memorandum in opposition to BankAtlantic's motion for a j.n.o.v. The opinion says nothing of matters of record at the time the district court ruled.

BankAtlantic claimed that PaineWebber breached the Financial Advisor Agreement between the parties by recommending the interest rate swaps PaineWebber brokered. BankAtlantic also asserted tort claims alleging that PaineWebber breached its duties as financial advisor by recommending the interest rate swaps. The duties that BankAtlantic alleged PaineWebber breached arose pursuant to the Financial Advisor Agreement.

PaineWebber defended by arguing that no contractual or other duties arose from the Financial Advisor Agreement with respect to the interest rate swaps. PaineWebber's counterclaim sought to recover from BankAtlantic for payment of its attorneys' fees and costs pursuant to the contract's indemnity provisions, which require the reimbursement of any such expenses for the "defense of any ... claim ... arising out of or in connection with [PaineWebber's] acting pursuant to the [agreement]. ..." A-79-80.

PaineWebber's defense that it was not liable, because the swaps were outside the Agreement, does not affect or diminish its right to indemnity for BankAtlantic's claims. There is no dispute that all of BankAtlantic's claims stemmed from duties it alleged PaineWebber owed as BankAtlantic's financial advisor. Indeed, in reviewing the record in its initial opinion, the Eleventh Circuit declared:

> In its complaint, BankAtlantic alleged that it had hired PaineWebber to be BankAtlantic's financial advisor in 1984, and that PaineWebber had abused its position to derive benefits at BankAtlantic's expense.

Atlantic Fed. Savs. & Loan Ass'n. v. Blythe Eastman PaineWebber, Inc., 890 F.2d 371 (11th Cir. 1989).

BankAtlantic's brief to the Eleventh Circuit, in its most recent appeal, again made plain that its claims were entirely premised on PaineWebber's alleged failure to fulfill its duties and obligations as a financial advisor under the Agreement:

> PaineWebber owed fiduciary duties to BankAtlantic within the scope of the agreement.
>
> * * *
>
> PaineWebber's duties had been reduced to writing and were clear and unambiguous.
>
> * * *
>
> Most fundamentally of all, PaineWebber simply failed as a matter of law in its duty *as a financial advisor* to advise BankAtlantic about the financial consequences of the two interest rate swaps it recommended, which failure proximately caused BankAtlantic substantial damages.

BankAtlantic's Brief at 9, 23-24, 46 (emphasis added) (citations omitted).

PaineWebber had a clear right to indemnity under the Agreement, because BankAtlantic's claim arose "out of or in connection with [PaineWebber's] acting pursuant to the [agreement.]"[2]

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[2]In its brief in opposition to PaineWebber's petition for writ of certiorari, BankAtlantic contends that its breach of contract claim sought only return of the fees paid by PaineWebber while its tort claim sought recovery of the $30 million paid to Homestead Savings. This statement is belied by the BankAtlantic's Amended Complaint, which evidences that *all* of BankAtlantic's claims were tied to the agreement by which PaineWebber was retained as BankAtlantic's financial advisor. *See* A-85.

BankAtlantic also contends that the Eleventh Circuit's holding was based upon application of Florida law regarding contract construction. Although the Eleventh Circuit's opinion discusses Florida law, its holding was based on other grounds:

> While we agree with the district court's interpretation of the Indemnification Agreement [under Florida law], ultimately PaineWebber's assertion of its right to expenses pursuant to that agreement must be rejected on other grounds.

A-28-29. The Eleventh Circuit's holding, in affirming a judgment on the pleadings based upon PaineWebber's memorandum in opposition to BankAtlantic's motion for a j.n.o.v., creates a conflict that this Court should resolve.

II. THE OPINION RECEDES FROM THE ECONOMIC LOSS RULE

BankAtlantic argues that the Eleventh Circuit's opinion does not recede from the economic loss rule by conclusorily claiming that BankAtlantic alleged "independent torts." BankAtlantic relies on *Kee v. National Reserve Life Insurance Co.*, 918 F.2d 1538 (11th Cir. 1990), to support this argument.

Kee, however, demonstrates that BankAtlantic had no independent tort claims; instead, all of BankAtlantic's claims were based upon the Financial Advisor Agreement, which contained the indemnity provision.

BankAtlantic cites the Eleventh Circuit's statement in *Kee* that "the mere existence of a contract claim does not automatically vitiate all causes of action in tort." *Id.* at 1543. Yet, BankAtlantic ignores the Eleventh Circuit's holding that "'without some conduct resulting in personal injury or property damages, there can be no independent tort flowing from a contractual breach which would justify a tort claim solely for economic losses.'" *Id.* (quoting *AFM Corp. v. Southern Bell Tel. & Tel. Co.*, 515 So. 2d 180, 181-82 (Fla.

1987)). The Eleventh Circuit relied upon the Florida Supreme Court's opinion in *AFM*, 515 So. 2d at 181-82, as authority. As previously noted, in *AFM*, the Florida Supreme Court adopted the economic loss rule and this Court's opinion in *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

Moreover, the Eleventh Circuit's holding in *Kee* is directly contrary to the very arguments BankAtlantic now makes. The Eleventh Circuit applied the economic loss rule to hold that the plaintiff could *not* recover in tort. The court noted that there was no personal injury or property damage, and that the damages claimed under the contract and tort claims were identical:

> Where the compensatory damages requested in a count for tort are identical to the compensatory damages sought in a count for breach of contract, compensatory damages and punitive damages for the tort are not recoverable.

Id. at 1543.

In this case, as in *Kee*, BankAtlantic did not seek damages for personal injury or property damage. Moreover, its damage claims were identical in both its tort and contract claims. Contrary to BankAtlantic's assertion that its contract claim merely sought recovery of the fees paid to PaineWebber, each of its causes of action, tort and contract, sought the identical measure of damages — BankAtlantic's payments to Homestead pursuant to the interest rate swaps together with the fees paid to PaineWebber. A-93-95, 97-101. Thus, BankAtlantic had no tort claims independent of the Financial Advisor Agreement.

Nevertheless, in this case, the Eleventh Circuit absolved BankAtlantic of liability under the Agreement's indemnification provisions by holding that BankAtlantic somehow had independent tort claims. In so doing, the court receded from the economic loss rule and the policy an-

nounced by this Court in *East River* holding that the judiciary should refrain from "intrud[ing] into the parties' [contractual] allocation of . . . risk" by permitting the assertion of independent tort claims.

III. THE OPINION CONFLICTS WITH NATIONAL POLICY

BankAtlantic virtually ignores the fact that the Eleventh Circuit's opinion conflicts with national policy that fosters the use of alternative dispute resolution, such as indemnification agreements. The purpose of the indemnity provision in the Financial Advisor Agreement was to preclude the filing of baseless suits by corporate raiders successful in takeover attempts, which PaineWebber was retained to prevent. The indemnity provision would deter such filings by requiring BankAtlantic to pay the fees and costs incurred in defending this action.

The Eleventh Circuit, however, has failed to enforce the contractual provisions negotiated by these sophisticated parties. As a result, PaineWebber was required to engage in a five-week trial on claims that the jurors deemed "frivolous." The Court should enforce the agreed to indemnity provision in furtherance of the national policy to encourage alternative dispute resolution and to discourage attempts to skirt negotiated contractual remedies by the assertion of contrived tort claims.

CONCLUSION

A writ of certiorari should be issued to resolve the conflicting opinions of the circuit courts and to foster the national policy that prohibits interference with agreed economic risk allocation provisions.

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